Supreme Court, U.S.
FILED

961930 JUN 3 1997

No.
OFFICE OF THE CLERK

(1)

IN THE

UNITED STATES SUPREME COURT
OCTOBER TERM, 1996

CLARK GAREN,

Petitioner,

vs.

SUPREME COURT OF WASHINGTON,
WASHINGTON STATE BAR ASSOCIATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI

LAW OFFICES OF CLARK GAREN
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74 pp

QUESTIONS PRESENTED

(1) Is this Court going to continue to permit the States to violate the Fourteenth Amendment rights of Bar Applicants by allowing them to use morality to exclude people whose personality they dislike?

(2) Does the broad and vague requirement of "Good Moral Character" violate the Fourteenth Amendment when it results in denial of a professional license for conduct having no rational connection to the profession and not constituting either a felony, a serious misdemeanor, or even a criminal act?

(3) Must a State use the same standards to evaluate the moral character of all applicants?

(4) May a State use an admission procedure that violates procedural due process under the Fourteenth Amendment by:

a. Conducting a hearing without giving Petitioner advance notice of the matters of inquiry?

b. Delegating total responsibility for admissions from the Supreme Court to the State Bar?

c. Conducting admission proceedings in secret with no public record, no explanation, and no accountability for the decisions?

(5) Does it violate the Due Process or Equal Protection Clause of the Fourteenth Amendment to deny admission to an attorney licensed in other states for 25 years who has no discipline record without a factual finding he committed an immoral act?

PARTIES

Your Petitioner is CLARK GAREN, Attorney at Law, appearing in pro per, who is admitted to practice law before these Courts:

1. United States Supreme Court;
2. Ninth Circuit Federal Court of Appeals;
3. United States Tax Court;
4. Federal District Court for the Northern District of California;
5. Federal District Court for the Eastern District of California;
6. Federal District Court for the Central District of California;
7. Federal District Court for the Southern District of California;
8. Federal District Court for the District of Arizona;
9. Federal District Court for the Southern District of Texas;
10. Supreme Court of California;
11. Supreme Court of Texas.

The Respondents are the Supreme Court of Washington and the Washington State Bar Association.

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1. OPINIONS BELOW

The Order Denying Petition For Review was entered on March 6, 1997 by the Supreme Court of Washington herein sought to be reviewed is unreported and printed in Appendix A.

2. JURISDICTION

The judgment of the Supreme Court of Washington was entered on March 6, 1997. The jurisdiction of this Court is involved pursuant to 28 U.S.C. 1254(1).

3. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the first section of the Fourteenth Amendment to the Constitution of the United States, which provides as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

UNITED STATES CONSTITUTION.
FOURTEENTH AMENDMENT

4. STATEMENT OF THE CASE

A. JURISDICTIONAL STATEMENT [S.C.R. 14(g)(i)]

Your Petitioner raised each "Question Presented" involving Federal issues before the Supreme Court of Washington. The Supreme Court of Washington ruled against Petitioner on each "Question Presented" in its Order Denying Petition (Appendix A).

B. CONCISE FACTUAL STATEMENT

Petitioner graduated in 1971 from the University of West Los Angeles, School of Law. Your Petitioner was admitted in California on January 5, 1972 and in Texas on October 4, 1985. Your Petitioner also has held a California Provisional Elementary School Teaching Credential and a California Collection Agency Qualified Manager License.

No regulatory body has ever brought any action for discipline or imposed discipline on your Petitioner for any reason. Furthermore, no Court, tribunal or regulatory body has ever made a factual finding in an explicit and objective fashion that your Petitioner has ever committed an immoral act.

In 1992, your Petitioner entered the Master of Law (Taxation) program at Golden Gate University. Your Petitioner completed the program and received a Master of Laws (Taxation) degree in January, 1993.

On October 5, 1995, the Nevada Supreme Court denied your Petitioner admission to practice law on grounds of poor moral character. On February 20, 1996, this Court refused to review that decision (United States Supreme Court Case Number 95-987).

After this Court refused to review the decision of the Nevada Supreme Court, the Supreme Court of Washington also refused to admit Petitioner.

5. REASONS FOR GRANTING THE WRIT

A. IS THIS COURT GOING TO CONTINUE TO PERMIT THE STATES TO VIOLATE THE FOURTEENTH AMENDMENT RIGHTS OF BAR APPLICANTS BY ALLOWING THE STATES TO USE MORALITY TO EXCLUDE PEOPLE WHOSE PERSONALITY THEY DISLIKE?

By refusing to review attorney admission cases, this Court has given the States a clear signal that they can exclude applicants in violation of the Due Process and Equal Protection Causes of the Fourteenth Amendment with impunity.

This Court refuses to interfere with state qualifications for professional licenses, which gives the States a free license to discriminate and freely violate the rights of applicants. The States now do so in private, in secret, and with impunity. States are now denying professional licenses to applicants just because the members in power personally dislike the applicants.

B. DOES IT VIOLATE THE DUE PROCESS OR EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO DENY ADMISSION TO AN ATTORNEY LICENSED IN OTHER STATES FOR 25 YEARS WITH NO DISCIPLINE RECORD WITHOUT A FACTUAL FINDING HE COMMITTED AN IMMORAL ACT

This Petition will not address the factual issues establishing the violation of Petitioner's rights by the Supreme Court of Washington. The Dissent to Denial of Application to Practice Law filed by Justices Sanders and Madsen (Appendix B) establishes the violation of Petitioner's 14th Amendment rights in a far more objective and eloquent manner than could your Petitioner.

For example, on page 4 of Appendix B, Justice Sanders noted that the Bar and the majority of the Court "failed to factually find in an explicit and objective fashion that Mr. Garen had ever committed an immoral act." Notwithstanding, the majority refused to admit your Petitioner without even holding a hearing, analyzing the charges, or even explaining their action.

C. MUST A STATE USE THE SAME STANDARD TO EVALUATE THE MORAL CHARACTER OF ALL APPLICANTS

On pages 17-18 of Appendix B, Justice Sanders examined the last seven initial applicants for admission to practice law in Washington. Justice Sanders noted that the Supreme Court of Washington had just admitted applicants who:

1. "sold seven ounces each of cocaine and heron (Bar Applicant No. 60);

2. conspired to import and distribute marijuana and transported $250,000 to another country (Bar Applicant No. 59);

3. engaged in vehicle tampering and shoplifting (Bar Applicant No. 58);

4. sold over a pound of cocaine to undercover officers for $30,500 in addition to possessing over a half-a-pound of cocaine (Bar Applicant No. 57);

5. furnished alcohol to a minor, delivered a controlled substance to a minor, and committed third degree sodomy with a 14-year-old girl (Bar Applicant No. 56);

6. broke into a liquor store, burglarized home, stole payroll checks, and drove under the influence (Bar Applicant No. 55);

7. possessed marijuana and attempted to commit fraud (Bar Applicant No. 54).

Justice Sanders then challenged the majority as follows:

> "It is our charge to measure Mr. Garen's application by the standard we have applied to others. I would be most interested to hear any explanation from the majority as to how Mr. Garen has fallen below that standard we have set in prior proceedings enumerated above. *Cum tacent, clamant.*"

The dissenting opinion thoroughly and objectively dismisses each and every reason given by the Washington Bar Association and the State Bar of Nevada to deny your Petitioner admission to the practice of law. The comparison of the charges against your Petitioner as carefully and fully analyzed by Justice Sanders in his dissent attached hereto as Exhibit B to the conduct of the last seven questionable applicants admitted to the practice of law in Washington prove conclusively and irrefutably that the 14th Amendment rights of your Petitioner to equal protection under the law were violated by the Washington Supreme Court because they did not evaluate him by the same standards they used to evaluate the last seven other applicants.

D. DOES THE BROAD AND VAGUE REQUIREMENT OF "GOOD MORAL CHARACTER" VIOLATE THE FOURTEENTH AMENDMENT WHEN IT RESULTS IN DENIAL OF A PROFESSIONAL LICENSE FOR CONDUCT HAVING NO RATIONAL CONNECTION TO THE PROFESSION AND NOT CONSTITUTING EITHER A FELONY, A SERIOUS MISDEMEANOR, OR A CRIMINAL ACT

This Court rejected a prior challenge to the broad and vague requirement that Bar applicants possess "Good Moral Character" because no state had used it to adapt or to fit personal views and predilections, or turned the language into a dangerous instrument for the arbitrary and discriminatory denial of the right to practice law. This Court reasoned:

> "The few reported cases in which bar admission has been denied on character grounds in New York all appear to have involved instances of misconduct **clearly inconsistent** with the standards of a lawyers calling."
>
> Law Students Civil Rights Research Council, Inc. vs. Wadmond, (1971) 91 S.Ct. 720, 725, 401 U.S. 154, 160, 27 L.Ed. 2d. 749, 756

TODAY, THIS IS NOT TRUE!

This Court used to protect the rights of the individual by prohibiting states from excluding a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment. While states can require high standards of qualification, such as good moral character, this Court used to require that **any qualification must have a rational connection with the applicant's fitness or capacity to practice law.** This Court used to refuse to permit a state to exclude an applicant when there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory.

This Court has now given a clear signal to the states that it no longer cares! This Court has signaled the states that they can exclude applicants for any reason they want to with impunity and in secret, secure in the knowledge that this Court does not care and that this Court will never interfere!

This Court refused to review the decision of the Nevada Supreme Court denying admission to Petitioner (U. S. Supreme Court Case Number 95-987). The Supreme Court of Washington has now interpreted this refusal as a free license to continue to violate the constitutional rights of Petitioner with impunity. Both the Nevada decision (which this Court can no longer correct) and the Washington decision (which this Court still has jurisdiction to correct) conflict with every decision of both this Court and every other state court of last resort on this important Federal Question.

As a Judicial Act, this Judgment can only be appealed to this Court. If this Court refuses Certiorari, your Petitioner has no other remedy!

The term "Good Moral Character" is vague, easily adapted to fit personal views and predilections, and a dangerous instrument for arbitrary and discriminatory denial of the right to practice law. This Court, as the Court of last resort, had an obligation under the United States Constitution to review every denial of admission on character grounds that **did not involve** instances of misconduct **clearly inconsistent** with the standards of a lawyers calling. Since this Court no longer is willing to undertake this responsibility on a case by case basis, the ability of the states to exclude applications for lack of good moral character now violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

"The term "good moral character" has long been used as a qualification for membership in the Bar and has served a useful purpose in this respect. However the term, in itself, is unusually ambiguous. It can be defined in an almost unlimited number of ways for any definition will necessarily reflect the attitudes, experiences, and prejudices of the definer. Such a vague disqualification, which is easily adapted to fit personal views and predilections, **can be a dangerous instrument for arbitrary and discriminatory denial of the right to practice law**."

We recognize the importance of leaving States free to select their own bars, but it is equally important that the **State not exercise this power in an arbitrary or discriminatory manner nor in such a way as to impinge on the freedom of political expression or association**. A bar composed of lawyers of good character is a worthy objective but it is unnecessary to sacrifice vital freedoms in order to obtain that goal. It is **also** important to society that lawyers be unintimidated - free to think, speak, and act as members of an Independent Bar."

Konigsberg vs. State Bar of California, (1957) 77 S. Ct. 722, 733-734, 353 U. S. 252, 274-275, 1 L. Ed. 2d 810, 825

The ability to exclude a bar applicant for lack of good moral character without a factual finding in an explicit and objective fashion that the applicant committed an immoral act violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. This Court must now impose the additional requirement that a State may not reject an applicant for a professional license on grounds of poor moral character unless it makes a factual finding in an explicit and objective fashion of conduct by the applicant that would constitute either a felony, a serious misdemeanor, or a criminal act.

E. MAY A STATE USE AN ADMISSION PROCEDURE THAT VIOLATES PROCEDURAL DUE PROCESS UNDER THE FOURTEENTH AMENDMENT BY:

1. CONDUCTING A HEARING WITHOUT GIVING PETITIONER ADVANCE NOTICE OF THE MATTERS OF INQUIRY?

2. THE SUPREME COURT DELEGATING TOTAL RESPONSIBILITY FOR ADMISSIONS TO THE STATE BAR OF WASHINGTON?

3. CONDUCTING ADMISSION PROCEEDINGS IN SECRET WITH NO PUBLIC RECORD, EXPLANATION, OR ACCOUNTABILITY

The procedural due process requirements in Bar admission cases are:

"We are not here concerned with grounds which justify denial of a license to practice law but only with what procedural due process requires if the license is to be withheld. This is the problem which Chief Justice Taft averted to in Goldsmith vs. United States Board of Tax Appeals, 170 U.S. 117, 46 S. Ct. 215, 70 L. Ed. 494, involving an application of a certified public account to practice before the Board of Tax Appeals. Chief Justice Taft writing for the Court said:

"We think that the petitioner having shown by his application that being a citizen of the United States and a certified public account under the laws of a state, he was within the class of those entitled to be admitted to practice under the board's rules, he should not have been rejected upon charges of his unfitness without giving him an opportunity by notice for hearing and answer. The rules adopted by the board provide that 'the board may in its discretion deny admission, suspend or disbar any person.' But this must the construed to mean the exercise of a discretion to be exercised after fair investigation, with such a notice, hearing, and opportunity to answer for the applicant as would constitute due process." Id., p. 123, 46 S. Ct. p. 217"

We have emphasized in recent years that procedural due process often requires confrontation and cross-examination of those whose word

deprives a person of his livelihood. (citation omitted.) That view has been taken by several state courts when it comes to procedural due process and the admission to practice law. (citations omitted.)

This result is sought to be avoided in several ways. First, it is said that the Committee's action is merely advisory, that it is an investigator and not a trier of facts, since under Rule 90 of the Judiciary Law it is the Appellate Division that ultimately must be convinced of the applicant's good character. The answer is that "[u]nless otherwise ordered by the Appellate Division" (New York Rules of Civil Practice, Rule 1(d), a favorable certificate from the Committee is a requisite to admission by the Appellate Division; and where, as here, **the Appellate Division has held no hearings of its own to determine an applicant's character, the role of the Committee is more than that of a mere investigator.**

Third, it is said that the record shows that Petitioner was not rejected on the basis of *ex parte* statements but on the basis of his own statements to the Committee. If the Court of Appeals reached this conclusion, the only constitutional question which was presented and which it could have "necessarily" passed on was whether petitioner was denied due process by not being informed of and allowed to rebut the

bases for either the Committee's or the Appellate Division's failure to find his good character. **It does not appear from the record that either the Committee or the Appellate Division, at any stage of these proceedings, ever apprised petitioner of its reasons for failing to be convinced of his good character.** Petitioner was clearly entitled to notice of and a hearing on the **grounds for his rejection** either before the Committee or before the Appellate Division. (Citations omitted.) There seems no question but that petitioner was apprised of the matters the Committee was considering.

"But a 'full hearing' - a fair and open hearing - requires more than that. * * * Those who are brought into contest with * * * Government in a quasi judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be hearing upon its proposals **before it issues its final command**. (Morgan v. United States, 304 U.S. 1, 18-19, 58 S. Ct. 773, 776, 82 L. Ed. 1129.

Petitioner had no opportunity to ascertain and contest the bases of the Committee's reports to the Appellate Division, and the Appellate Division gave him no separate hearing. Yet, "[t]he requirements of fairness are not exhausted in the taking or consideration of evidence, but extend to the concluding parts of

> the procedure as well as to the beginning and intermediate steps. (citations omitted.)
>
> Willner vs. Committee on Character and Fitness, (1963), 373, U.S. 96, 105-106, 83 S. Ct. 1175, 1181, 10 L. Ed. 2d. 224, 230-231

The Washington State Bar violated the procedure established by this Court by questioning your Petitioner about numerous issues without notice. Instead of asserting his due process rights, your Petitioner fully answered all questions raised. The Supreme Court of Washington then not only refused to give your Petitioner a review or a hearing, they even refused to explain why Petitioner was being denied admission, and instead abdicated their responsibility to the Washington State Bar.

Justice Sanders describes the findings of the State Bar of Washington on page 13 of Appendix B as follows:

> "A review of the Bar's findings, however, evidences none are truly findings of any misconduct whatsoever on the part of Mr. Garen. To the extent they are findings of anything, they are findings of the subjective attitude of committee members which testify to the members' own feelings or doubts. But the committee's comfort level should not be Mr. Garen's problem. Nor should it be his problem that the committee has "doubts", as doubts can arise from a variety of sources including the listener's inattention or lack of understanding."

Justice Sanders goes on to note, on page 13 of Appendix B, that, "I find not a single objective finding that Mr. Garen has engaged in any activity, much less a pervasive pattern of activity, inconsistent with good moral character."

The Supreme Court of Washington has denied your Petitioner procedural due process in violation of the Fifth and Fourteenth Amendments by delegating its obligation to evaluate applicants to the Washington Bar Association, and then refusing to review or even explain the reasons for its decision.

6. ARGUMENT

Your Petitioner demonstrated he is of good moral character.

The State of Washington denied admission because they didn't like his personality; **not because he failed to demonstrate good moral character!**

This opinion is shared by Justices Sanders and Madsen of the Supreme Court of Washington who made the following observation on page 37 of Appendix B:

> "Oscar Wilde once said, "Morality is simply the attitude we adopt toward people whom we personally dislike. Given there was no real evidence of bad moral character on Mr. Garen's part, perhaps this explains why the committee did not recommend that Mr. Garen be admitted. **I can find no other.**"

The observation of Justices Sanders and Madsen are proved by the refusal of the majority to even **hear** this matter or explain their decision. Instead, they delegated the **final judgment** on the admission of your Petitioner to practice law to other members of the Washington State Bar, which consists of Petitoner's future competitors. The majority is silent because they **cannot** defend their action!

While the policy is to leave the States free to select their own bars, this Court cannot permit a **State to exercise this power in an arbitrary or discriminatory manner nor in such a way as to impinge on the freedom of political expression or association**. A bar composed of lawyers of good character is a worthy objective but it is unnecessary to sacrifice vital freedoms in order to obtain that goal. It is **also** important to society that lawyers be unintimidated - free to think, speak, and act as members of an Independent Bar.

There is **no** evidence in the record which rationally justifies the finding your Petitioner failed to establish his good moral character. Without some authentic reliable evidence of unlawful or immoral actions reflecting adversely upon him, there is no adequate basis to conclude your Petitioner is disloyal or a person of bad character. **A lifetime of good citizenship is worth very little if it is so frail that it cannot withstand the suspicions which apparently were the basis for the action of the Supreme Court of Washington.**

This Court must grant this Petition for Writ of Certiorari to prevent abuse of the term "good moral character" as a qualification for bar members. This Court has noted the language, "Good Moral Character" is unusually ambiguous and can be defined in an almost unlimited number of ways for any definition will necessarily reflect the attitudes, experiences, and prejudices of the definer and is such a vague disqualification that it can easily be adapted to fit personal views and predilections, and be a dangerous instrument for arbitrary and discriminatory denial of the right to practice law.

Since the states are now using morality as a tool to exclude people they dislike, this Court must now impose the additional requirement upon the States that they cannot deny admission to law applicants on the basis of poor moral character without an explicit and objective finding that the applicant committed an immoral act consisting of conduct that would constitute either a felony, a serious misdemeanor, or a criminal act.

Throughout history, the moral fitness requirement has functioned primarily as a cultural showpiece. In that role, it has excommunicated a diverse and changing community, variously defined to include not only former felons, but women, minorities, adulterers, radicals, and bankrupts... In the absence of meaningful standards or professional consensus, the filtering process has proved inconsistent, idiosyncratic and needlessly intrusive. We have developed neither a coherent concept of professional character nor effective procedures to predict it. Rather, we have maintained a licensing ritual that too often has debased the ideas it seeks to sustain.

7. CONCLUSION

Your Petitioner has been excluded from the practice of law in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment.

Your Petitioner has been excluded from the practice of law because the statutory scheme to qualify for admission in Washington contravenes the Due Process or Equal Protection Clause of the Fourteenth Amendment.

Your Petitioner prays that this Court find that the State of Washington has deprived your Petitioner of due process in denying him admission to the Washington State Bar.

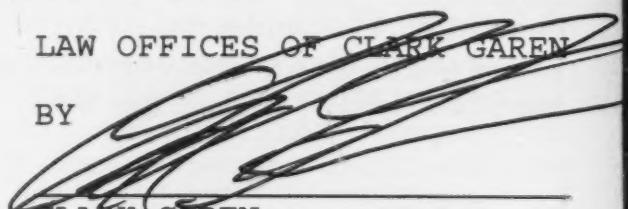
Your Petitioner further prays that this Court reverse the judgment of the Supreme Court of Washington and order that the Supreme Court of Washington admit your Petitioner to the practice of law in Washington.

Finally, your Petitioner prays that this Court now impose the additional requirement upon the States that they not exclude applicants from professions because of poor moral character unless there is an explicit and objective finding that the applicant committed an act that would constitute either a felony, a serious misdemeanor, or a criminal act.

Dated: 05/31/97

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APPENDIX "A"

BEST AVAILABLE COPY

THE SUPREME COURT OF WASHINGTON

IN RE:	
	B.A. NUMBER 61
CLARK GAREN,	
	ORDER DENYING PETITION
BAR APPLICANT.	FOR REVIEW

FILED
MARCH 6, 1997

C.J. MERRITT,
CLERK OF THE SUPREME COURT

Clark Garen, Bar applicant, filed a Petition for Review of Denial of His Application to Practice Law by the Board of Governors of the Washington State Bar Association and a Request for Publication of Decision on the Petition. The WSBA filed a Response to the Petition and Request for Publication. The matter was considered by the Court without oral argument on January 9, 1997, at the En Banc Conference. Now, therefore, it is hereby

ORDERED:

The Petition for Review of Denial of Clark Garen's Application to Practice Law by the Board of Governors of the Washington State Bar Association is denied. Clark Garen's Request for Publication of the Decision is denied.

DATED at Olympia, Washington the 6th day of March, 1997.

/s/ DURHAM, C.J.
CHIEF JUSTICE

STATE OF WASHINGTON)
COUNTY OF THURSTON)SS.

I, C.J. Merritt, Clerk of the Supreme Court of the State of Washington, do hereby certify that this is a true and correct copy of the original on file in my office.

Dated this 6th day of March, 1997

By /s/ C.J. MERRITT (SEAL)

THE SUPREME COURT OF WASHINGTON

IN RE:	)	B.A. NUMBER 61
	)	
CLARK GAREN,	)	DISSENT TO DENIAL OF
	)	APPLICATION TO PRACTICE
BAR APPLICANT.	)	LAW
	)	

FILED
MAY 20, 1997

C.J. MERRITT,
CLERK OF THE SUPREME COURT

(SEAL)

STATE OF WASHINGTON)
COUNTY OF THURSTON) ss.

I, C.J. Merritt, Clerk of the Supreme Court of the State of Washington, do hereby certify that this is a true and correct copy of the original on file in my office.

Dated this 20th day of May, 1997

By /s/ C.J. MERRITT

In re Clark Garen, Bar Applicant
B.A. Number 61
Dissent by Sanders, J., to Denial of Application to Practice Law

SANDERS, J. (Dissenting)---

> [T]he profession of an attorney is of great importance to an individual, and the prosperity of his whole life may depend on its exercise. The right to exercise it ought not be lightly or capriciously taken from him.

Chief Justice John Marshall.[1]

"Every person desiring to be admitted to the Bar of the State of Washington must be of good moral character and must qualify for and pass a bar examination." APR3(a). Mr. Clark Garen passed the bar exam yet has been denied admission for alleged deficiency in the "good moral character" department. Such was the result recommended by the Washington State Bar Association's Character and Fitness Committee as well as the Board of Governors. And such is the result imposed by a majority of this court when it denied Mr. Garen's appeal by summary order entered March 6, 1997 without favor of written opinion, published or not.

Perhaps anticipating this turn of events, Mr. Garen requested his appeal be determined by published narrative opinion. The Bar did not object. Reading between the lines, I surmise

---

1. *Ex Parte Burr*, 22 U.S. 529, 6 L. Ed. 152, 9 Wheat. 529 (1824).

Mr. Garen believed an adverse result less likely if the court were to judge his cause upon established legal principles of general application. He may have assumed such would be more likely in a disposition by published opinion. But the court's denial of Mr. Garen's request for a narrative opinion published or not, puts this dissenter in the unlikely position of contesting a result which is not only unsupported by persuasive reason, but unsupported by any articulated reason whatsoever.

From a review of the factual background it appears Mr. Garen came to the attention of Bar authorities through his application to practice law in this jurisdiction. Such application is governed by the Admission to Practice Rules (APR) which reserve to the Supreme Court the ultimate authority on such matters but delegate initial responsibility to the Board of Governors. APR3(c) provides "[t]he Board of Governors may, in its discretion, withhold permission from an otherwise qualified person to sit for the bar examination, until completion of an inquiry into the applicant's character and fitness," if, amongst other things, the applicant "has previously been denied admission to the Bar in this or any other jurisdiction for reasons other than failure to pass a bar examination." It appears the Bar has withheld such permission since Mr. Garen, although a member in standing of both the California and Texas bars, has nonetheless been denied admission to practice in Nevada for reasons other than his performance on its bar examination.

In exercise of its prerogative the Board of Governors referred Mr. Garen to its Character and Fitness Committee for further investigation

pursuant to APR 7. That committee then conducted a hearing wherein Mr. Garen was the only live witness, although substantial additional written materials were received into evidence in the form of 13 declarations attesting to Mr. Garen's moral fitness and several hundred pages of transcripts from the Nevada State Bar's proceeding.

Thereafter the Character and Fitness Committee promulgated a written decision recommending that Mr. Garen's application to practice law in this jurisdiction be denied for his alleged failure to possess "good moral character."

The committee's written decision is remarkable in two respect: first, despite quite overwhelming and uncontested evidence, the committee declined to affirmatively find anything morally redeeming about Mr. Garen whatsoever; and, second, the committee failed to factually find in an explicit and objective fashion the Mr. Garen had ever committed an immoral act. Rather the committee's adverse recommendation was ostensibly based on subjective "feelings" and "doubts" rather than objectively verifiable reasons of facts. So as not to deprive the reader of the flavor of the committee's written decision I have attached it verbatim, as an exhibit (see Exhibit A, attached).

As previously recounted, the Board accepted the recommendation of the Character and Fitness Committee that Mr. Garen's application be denied and the majority of this court has affixed its imprimatur to that result as well. I would disagree, however, based upon my perception that Mr. Garen has made a quite adequate prima facie

showing of good moral character which the Bar utterly failed to disprove.

Analysis begins by noting the paucity of published authority in this jurisdiction on the meaning of "good moral character," much less the recommended procedure for it to be proved, or disproved. Only two published decisions emanate from this court on the topic: *In re Belsher*, 102 Wn.2d 844, 689 P.2d 1078 (1984) and *In re Wright*, 102 Wn.2d 855, 690 P.2d 1134 (1984). In both cases the applicant came to the court burdened with a record of serious misconduct. Dennis Belsher, for example, blew up his parents' car with a home-made bomb, although his parents miraculously escaped injury. Nevertheless, the Board of Governors found Mr. Belsher fit to practice law in this State, although ultimately this court turned aside the favorable recommendation, concluding it was not in the interest of the public or the Bar to admit Mr. Belsher to practice "at this time." *Belsher*, 102 Wn.2d at 854. The second case, *In re Wright*, was apparently a closer case as it ended in a split decision, four justices favoring the admission of Mr. Wright as per the Bar's recommendation, four justices opposed. Mr. Wright had been convicted of second degree murder while armed with a firearm. While his appeal was pending from this criminal conviction, he was charged and ultimately pleaded guilty to possession of heroin as well.

The issue presented to the court in both cases was whether or not these individuals had been sufficiently rehabilitated since their prior criminal activities which, all would seem to admit, were in themselves inconsistent with good moral character. The court in *Belsher*

recited that the burden to demonstrate good moral character rests on the applicant.[2] *Belsher*, however did not determine whether the burden imposed upon the new applicants should be severe as that imposed upon an applicant for reinstatement, finding unnecessary to determine the applicability of the California rule which generally provides:

> The person seeking reinstatement, after disbarment, should be required to present stronger proof of his present honesty and integrity than one seeking admission for the first time whose character has never been in question.

Belsher, 102 Wn.2d at 851 (quoting *Tardiff v. State Bar*, 27 Cal. 3d 395, 403, 612 P.2d 919, 165 Cal. Rptr. 829 (1980)) (quoting *Roth v. State Bar*, 40 Cal. 2d 307, 313, 253 P.2d 969, 974 (1953)).

However assuming reinstatement places no less a burden on the applicant to show good moral character, if not considerably more than would be the case for an original applicant, it

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2. In an initial disciplinary proceeding the burden is on the Bar to prove misconduct by clear and convincing evidence. *In re Allotta*, 109 Wn.2d 787, 792, 748 P.2d 628 (1988). Our authority does not illuminate why the new applicant should be burdened to prove good moral character rather than having such fact presumed with the burden on the Bar to prove otherwise.

is relevant to recall situations where we have determined the burden has been carried for the purpose of reinstatement notwithstanding a record of substantial prior misconduct. These cases are relevant because Mr. Garen's application for admission must be judged by the same criteria as that which has been applied to others. Equal protection of the laws requires no less. Const. art. I, **Ss** 12.

Given it is the burden of the initial applicant as well as the applicant for reinstatement to show evidence of good moral character the question still remains how, in a practical sense, the applicant proceeds to meet that burden. I find not Washington authority on point, however, would commend favorable the California rule which seems persuasive: "Once the applicant has furnished enough evidence of good character to establish a prima facie case, the Committee may attempt to rebut that showing." *Hall v. Committee of Bar Exam'rs*, 25 Cal. 3d 730, 602, P.2d 768, 770, 159 Cal. Rptr. 848, 850, (1979). If the Bar is unable to rebut the prima facie case, then the applicant must introduce further evidence of good moral character or discredit the State Bar's evidence." *Lubetzsy v. State Bar of Cal.*, 54 Cal. 3d 308, 815 P.2d 341, 342, 285 Cal. Rptr. 268, 269 (1991). California also requires that any reasonable doubts encountered by the court in its examination of the evidence be resolved in favor of the accused applicant. *Hallinan v. Committee of Bar Exam'rs*, 65 Cal. 2d 447, 421 P.2d 76, 80, 55 Cal Rptr. 228, 232 (1966). Given our constitutional bias in favor of individual rights, I would adopt this rule as well although the application of such a rule in my opinion is not necessary to resolve this case in petitioner's favor. *See* Const. Art. I,

Ss 1 ("[G]overnments... are established to protect and maintain individual rights.").

Declining to examine in detail the fine points and possible perturbations of the California rule, I suggest the general method requiring an applicant to come forward with a prima facie case with a subsequent burden to disprove upon the Bar Association is at least one logical way to proceed assuming, ad arguendo, the burden to prove good moral character is indeed on the applicant.

Prima Facie Case of Good Moral Character

To prima facie show good moral character, Mr. Garen demonstrated, without dispute, he is currently licensed to practice in both California and Texas. During his 25 years in the California Bar and his 12 years in the Texas Bar, Mr. Garen has never been the subject of a single disciplinary complaint lodged by a client. Nor has he ever been sued for malpractice. Nor has he ever been professionally disciplined by the Bar of Supreme Court of either state and is now, as he has been at all times material hereto, a member in good standing in each state.

Additionally, Mr. Garen produced 13 affidavits of former and current clients, employees, and other attesting to his good moral character. One affidavit came from Jerome Fishkin, former senior prosecutor of disciplinary cases for the California State Bar. Mr. Fishkin stated in his affidavit, "In my knowledge, throughout his twenty-four years of practice of law, Mr. Garen has always demonstrated good moral character. He has

always abided by the high ethical standards required of attorneys. He has never obstructed the administration of justice or otherwise acted unscrupulously in his capacity as an officer of the Court." Clerk's Papers (CP) at 32. Mr. Fishkin concluded, "it is my professional opinion that Mr. Garen is `of good moral character and willing to and in fact does abide by the high ethical standards required of attorneys.'" CP at 32. Similarly, the affidavit of Jim Fitzpatrick a client of Mr. Garen, stated "Clark Garen is the most honest, moral person I have ever had the privilege of knowing...." CP at 35. Many of the affidavits in Mr. Garen's favor were submitted by attorneys who had either worked with or for him. On whole, the affidavits were overwhelming in their praise of Mr. Garen, his ethics, and morality.

He also petitioned our Bar aided by special academic qualifications which speak highly of his desire to excel in his chosen profession.[3]

Such affidavits from friends, colleagues, and brother lawyers are most welcome evidence in

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3. In 1993, Mr. Garen received an LL.M. in Taxation from Golden Gate University in San Francisco. Joseph Walsh, the Dean of the Department of Tax at Golden Gate University during Mr. Garen's residence there, submitted an affidavit attesting to Mr. Garen's achievements in the program. Mr. Garen attained a substantially higher-than-average grade point average, an especially notable achievement given the fact that Mr. Garen had no prior accounting or tax background. There are only three Master of Law programs on the West Coast.

such matters. "A person called on to prove his character is compelled to turn to the people who know him." *Konigsberg v. State Bar of Cal.*, 353 U.S. 252, 264, 77 S. Ct. 722, 729, 1 L. Ed. 2d 810 (1957). The Supreme Court of California "accord[s] `significant weight' in making a prima facie case to testimonials from attorneys on an applicant's behalf." *Lubetzky*, 815 P.2d at 344 n.3, 285 Cal. Rptr. at 271 n.3. Mr. Garen has certainly established a prima facie case of good moral character through his own testimony in addition to the 13 testimonial affidavits. The Character and Fitness Committee did not find otherwise.

Notwithstanding, the Character and Fitness Committee made no affirmative finding regarding Mr. Garen's establishing a prima facie case of good moral character even though it is beyond dispute and beyond controversy. Since the aforementioned is highly relevant if not dispositive of Mr. Garen's good moral character, I find the committee's failure to give credit where credit is due most puzzling as it is the general obligation of the trier of fact to make affirmative findings on the relevant issues where the evidence so indicates. *Federal Signal Corp. v. Safety Factors, Inc.*, 125 Wn2d 413, 442, 886 P.2d 172 (1994). While a reviewing court is in no position to view the demeanor of the witnesses, these matters upon which Mr. Garen relies to demonstrate good character are of an objective factual nature, and many are established within documentary evidence. A reviewing court is as competent to weight the documentary evidence as any court in the first instance. *In re Riley's Estate*, 78 Wn.2d 623, 654, 479 P.2d 1, 48 A.L.R.3d 9 (1970). I therefore believe it would be an accurate statement of the law and entirely reasonable,

based upon these facts, to hold that Mr. Garen should be admitted to practice absent good reason to the contrary.

Facts of Bar's Rebuttal

The Bar's rebuttal to Mr. Garen's claim of good moral character is focused upon eight topics: (1) alleged unpaid property tax liens in California; (2) alleged unauthorized practice of law in Nevada; (3) alleged lack of business license in Las Vegas; (4) litigation with a former business partner; (5) bankruptcy; (6) litigation with a former tenant; (7) Bar complaints in California; and (8) telling only the "technical truth" in his application to be admitted to practice law in this State.

Whether or not any of these topics is a relevant subject of inquiry into "good moral character" is a legal question for further inquiry; however, whether or not any of the above topics has been factually proved is a matter we would normally initially address to the factual findings promulgated by the Character and Fitness Committee. By analogy to review of a bench trial, we normally accept trial court findings as verities on appeal insofar as same were supported by substantial evidence. *Weyerhaeuser v. Pierce County*, 124 Wn.2d 26, 35, 873 P.2d 498 (1994); *Industrial Electric-Seattle v. Bosko*, 67 Wn.2d 783, 791, 410 P.2d 10 (1966). Findings must be made on matters which establish the existence or nonexistence of determinative factual matters, and the findings of fact should reveal the process used by the decision maker. Weyerhaeuser, 124 Wn.2d at 36. However, we would not rewrite the findings for the court; nor would we ordinarily substitute findings to

support a legal conclusion not otherwise supported by findings which the superior court declined to make on its own. *Industrial Electric-Seattle*, 67 Wn.2d at 791. Legal conclusion unsupported by findings fail by their own weight because they lack support. *Alexander Myers & Co. v. Hope*, 88 Wn.2d 449,460, 565 P.2d 80 (1977). Most importantly, "[s]tatements of the positions of the parties, and a summary of the evidence presented, with findings which consist of general conclusions drawn from an `indefinite, uncertain, undeterminative narration of general conditions and events', are not adequate." *Weyerhaeuser*, 124 Wn.2d at 36 (quoting *State ex rel. Bohon v. Department of Pub. Serv.*, 6 Wn.2d 676, 694, 108 P.2d 663 (1940)).

It cannot be gainsaid, however, for the Bar to rebut Mr. Garen's prima facie showing of good moral character it is necessary for the committee to make specific findings of misconduct on the part of Mr. Garen inconsistent with his prima facie showing. Vague denials of professional licenses violate due process. *See In re Berkan*, 648 F.2d 1386, 1388 (1st Cir. 1981) (due process violated when applicant informed of her denial by one sentence letter providing no reasons).

A review of the Bar's findings, however, evidences none are truly findings of any misconduct whatsoever on the part of Mr. Garen. To the extent they are findings of anything, they are findings of the subjective attitude of the committee members which testify to the members' own feelings and doubts. But the committee's comfort level should not be Mr Garen's problem. Nor should it be his problem

that the committee has "doubts," as doubts can arise from a variety of sources including the listener's inattention or lack of understanding.

Where there objective factual findings to be reviewed, we would review same to determine whether such clearly demonstrated a consistent and substantial pattern of moral deficiency rationally related to the applicant's fitness to practice law. "A state can require high standards for application, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law." *Schware v. Board of Bar Exam'r*, 353 U.S. 232, 239, 77 S. Ct. 752, 756, 1 L. Ed.2d 796, 64 A.L.R.2d 288 (1957).

Yet I find not a single objective finding that Mr. Garen has engaged in any activity, much less a pervasive pattern of activity, inconsistent with good moral character. I would therefore summarily reverse the committee and the Board of Governors based on a facial review of the findings without further inquiry.; Nevertheless I will proceed to test this result by every measure.

Analysis

At issue is the meaning of good moral character in conjunction with the factual question of whether or not Mr. Garen has it.

Although an attorney applicant must "be of good moral character" to be admitted to practice in our State (APR3(a)), beyond this statement there is neither clear nor predictable criteria for determining "good moral character." Such

ambiguity is well suited to abuse:

> The term "good moral character" has long been used as a qualification for membership in the Bar and has served a useful purpose in this respect. However the term, by itself, is unusually ambiguous. It can be defined in an almost unlimited number of ways for any definition will necessarily reflect the attitudes, experiences, and prejudices of the definer. Such a vague qualification, which is easily adapted to pit personal views and predilections, can be a dangerous instrument for arbitrary and discriminatory denial of the right to practice law.

Konigsberg, 353 U.S. at 262-63 (footnote omitted). "The plain truth of the matter is that `good moral character' is an elusive, ill-defined concept often playing to the hearts as well as the minds of those whose task it is to make such judgments about others." C. Graham Carothers, *Character and Fitness: A Need for Increased Perception*, The Bar Examiner 25 (Aug. 1982). As this court has recognized, "[t]he twin questions of good moral character and fitness to practice law escape precise definition." *In re Wright*, 102 Wn.2d 855, 858, 690 P.2d 1134 (1984).[4]

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4. When it is a matter of entry into the profession, the prospective lawyer is required to be a morally good person. Yet once admitted, he is required to be immoral, if not amoral. It is inconsistent and self-defeating

In re Clark Garen, Bar Applicant
B.A. Number 61

Our court was impressed by the Florida definition of good moral character:

> "The inquiry into good moral character which emphasizes honesty, fairness, and respect for the rights of others and for the laws of this state and nation is a proper and suitable standard for those who desire to be an integral part of the administration of justice in the courts of this state."

Frederick A. Elliston, *Character and Fitness Tests: An Ethical Perspective*, The Bar Examiner 15-16 (Aug. 1982).

In re Wright, 102 Wn.2d at 858-59 (quoting *Florida Bd. Of Bar Exam'rs re: G.W.L.*, 364 So.2d 454, 458 (1978)).

By dictionary definition, "moral" is "of or relating to principles or considerations of right and wrong action or good and bad character...." *Webster's Third New International Dictionary* 1468 (1976). "Character" includes "outward and visible quality or trait." Id. At 376. "Good moral character" therefore must be a propensity to do right rather than wrong, to be honest rather than dishonest, to be fair rather than unfair, and to

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to test people for qualities they must have in order to be admitted to a profession if they are subsequently required to abjure those same qualities in order to function within it... As long as everyone is entitled to representation, some lawyer will need to assist that person in a legal but immoral act.

respect the rights of others rather than defeat them. The object of our inquiry is therefore to determine a trait or generalization based upon a general course of conduct rather than a particular event, unless that event is so significant so as to have overshadowing importance. In the case of Mr. Wright, for example, the court concluded "second degree murder does not exhibit good moral character." *In re Wright*, 102 Wn.2d at 859. By the same token, prior engagement in criminal enterprise may also point to bad moral character. *Cf. In re Belsher*, 102 Wn.2d at 851-52. Even so, we have admitted or readmitted others to practice notwithstanding prior criminal conduct when rehabilitation is demonstrated. Le us weigh the claims of the Bar by the standard we have set for ourselves in prior proceedings.

We have reinstated attorneys who have committed serious illegal and/or immoral acts including: second-degree assault (*In re McGrath*, 112 Wn.2d 481, 482, 772 P.2d 502 (1989)); misappropriation of client funds (*In re Moynihan*, 113 Wn.2d 219, 220, 778 P.2d 521 (1989); *In re Rosellini*, 108 Wn.2d 350, 355, 739 P.2d 658 (1987); *In re Chantry*, 84 Wn.2d 153, 154, 524 P.2d 909 (1974)); witness tampering (*In re Stroh*, 108 Wn.2d 410, 41, 739 P.2d 690 (1987); *In re Shain*, 24 Wn.2d 598, 166 P.2d 843 (1946)); lying to a client (*In re Livesey*, 94 Wn.2d 251, 252, 615 P.2d 1294 (1980)); possession of bank robbery proceeds (*In re Egger*, 93 Wn.2d 706, 707, 611 P.2d 1260 (1980)); burglary (*In re Krogh*, 93 Wn.2d 504, 505, 610 P.2d 1319 (1980)); grand larceny (*In re Johnson*, 92 Wn.2d 349, 350, 597 P.2d 113 (1979)); assault

with intention to commit rape (*In re Simmons*, 81 Wn.2d 43, 44, 499 P.2d 874 (1972); fraud (*In re Eddleman*, 79 Wn.2d 725, 489 P.2d 174 (1971)); mail fraud (*In re Lonergan*, 23 Wn.2d 767, 767, 162 P.2d 289 (1945)); embezzlement (*In re Lillions*, 196 Wash. 272, 82 P.2d 571 (1938)); and having an affair with a juror in a cause in which the attorney was counsel (*In re Bruener*, 178 Wash. 165, 34 P.2d 437 (1934).[5]

Moreover, regarding just the last seven initial applicants for admission considered by this court, we have granted admission to applicants who have: sold seven ounces each of cocaine and heroin (Bar Applicant No. 60); conspired to import and distribute marijuana and transported $250,000 to another country (Bar Applicant No. 59); engaged in vehicle tampering and shoplifting (Bar Applicant No. 58); sold over a pound of cocaine to undercover officers for $30,500 in addition to possessing over half-a-pound of cocaine (Bar Applicant No. 57); furnished alcohol to a minor, delivered a controlled substance to a minor, and committed third degree sodomy with a 14-year-old girl (Bar Applicant No. 56); broke into a liquor store, burglarized a home, stole payroll checks, and drove under the influence (Bar Applicant No. 55); and possessed marijuana and attempted to commit fraud (Bar Applicant No. 54).

It is therefore our charge to measure Mr. Garen's application by the standard we have

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5. One case, *In re Greenwood*, 22 Wn.2d 684, 157 P.2d 591 (1945), does not report the misconduct for which the attorney was disbarred.

applied to others. I would be most interested to hear any explanation from the majority as to how Mr. Garen has fallen below that standard we have set in the prior proceedings enumerated above. *Cum tacent, clamant.*[6]

Tax Liens

Mr. Garen admitted to tax liens on Los Angeles County property, unpaid since 1990, in the amount of a few thousand dollars. He testified before both the Nevada and Washington committees he currently did not intend to pay the liens but would do so when he sells other real property in Los Angeles. This is frequently the practice since these liens show as a defect in title and new purchasers often, but not necessarily, require clear title before closing.

Aside from simple economics, Mr. Garen testified before the Nevada Committee he did not think the liens were legitimate and initially contested their basis in a proceeding to contest the assessed value. But when he lost his challenge he did not further appeal. He testified he did not pay the liens because he was very upset about the valuation and this was the manner he elected to handle his personal affairs. On this basis the Character and Fitness Committee concluded: "Mr. Garen's cavalier attitude in reference to the tax liens indicate his disregard and disrespect for the lawful process." CP at 7. To the contrary, it appears Mr. Garen fully participated in the process but rather was dissatisfied with its

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6. Their very silence is a loud cry. *Cicero, In Catilinam*, I, 21.

result.

What is missing from the committee's conclusion, of course, is any discussion of how Mr. Garen's failure to pay a tax lien on real property is "immoral." Refusal or failure to pay property tax is *malum prohibitum* , not *malum in se*. Moreover, in both California and Washington it is the property that owes the tax; there is no personal obligation on the part of the individual to pay it. *See City of Huntington Beach v. Superior Court of Orange County*, 78 Cal. App. 3d 333, 144 Cal. Rptr. 236, 240 (1978))"Real property taxes are imposed on the ownership of property as such; they recur annually on a fixed date; and no personal liability arises from their nonpayment, the sole security for the taxes being the property itself."); *Clark-Kunzl Co. v. Williams*, 78 Wn.2d 59, 63, 469 P.2d 874 (1970)("[P]roperty taxes are primarily in rem in character. The tax is imposed against the property itself, not against the owners of the various interests in the land.") One may even acquire property previously burdened by a lien for unpaid taxes. Nonpayment is not indicative of an immoral act; it is an economic decision. As someone with an advanced degree in taxation, Mr. Garen would know better than anyone the implications, or lack thereof, of failing to pay property taxes. Failure to promptly pay real property taxes results in added interest and possible penalties. After a certain time the taxing authority will foreclose absent payment. There is nothing illegal or immoral about deferring payment---or never paying at all.

Mr. Garen also asserts that he was exercising his right to free speech (actually engaging in nonviolent civil disobedience is the

analogy) by not paying taxes on the property:

> The issue is not taxes; it is my moral character. I do not have numerous outstanding tax liens; I **only** have liens on the two parcels of real property that I believe were unfairly assessed and taxed. I do not have unpaid tax bills (or unpaid bills of any other kind or character). I have two unpaid property tax bills that are not paid **because I dispute them!**

CP at 10.

Perhaps the committee considered Mr. Garen's preceding explanation a "cavalier attitude." If so, I find nothing immoral about a cavalier attitude; rather, it is a matter of personality, not morality. Nor can any adverse inference be drawn from Mr. Garen's apparent lack of remorse since there is an inadequate demonstration that he has anything to be remorseful about. *Compare Hall v. Committee of Bar Exam'rs*, 25 Cal. 3d 370, 602 P.2d 768, 776-77, 159 Cal. Rptr. 848, 856-57 (1979)(California Supreme Court reversed committee's rejection of bar applicant, rejecting claim that good moral character requires a false declaration of remorse). We cannot expect Mr. Garen to "beat his breast and loudly proclaim mea culpa for a dissolute past," *Caaway v. State Bar of Cal.*, 41 Cal. 3d 743, 716 P.2d 371, 373, 225 Cal Rptr. 267, 269 (1986), when he believes he has done nothing wrong, and has done nothing wrong in fact.

Although I disagree failure to pay real estate taxes is an act of civil disobedience

absent a personal obligation to pay the tax in the first instance, acts of civil disobedience do not involve moral turpitude in any event. *Hallinan*, 421 P.2d at 85 ("We do not believe that petitioner's participation in the civil disobedience here shown can be characterized as involving moral turpitude. If we were to deny to every person who has engaged in a `sit-in' or other form of nonviolent civil disobedience, and who has been convicted therefor, the right to enter a licensed profession, we would deprive the community of the services of many highest qualified persons of the highest moral courage. This should not be done."). The Boston Tea Party was certainly an illegal tax protest, yet I would not jump to the conclusion those young men were unfit to practice law in this jurisdiction for that reason. Frankly they have demonstrated a zealous quality which might be most desirable to a client.

For these reasons I conclude that Mr. Garen's failure/refusal to pay property taxes in Los Angeles does not rebut his prima facie demonstration of good moral character.

Unauthorized Practice of Law

While he was living in Las Vegas, Mr. Garen used the following letterhead:

Admitted to practice in California and Texas

CLARK GAREN
ATTORNEY AT LAW
ADVERTISING AGENCY
1212 South Casino Center Blvd.
Law Vegas, Nevada 89104
(702) 435-7335
FAX: (702) 434-3247

CP at 292. The committee complained this letterhead did not contain any limiting language (notwithstanding the qualification "admitted to practice in California dn Texas"), expressly stating Mr. Garen did not have a license to practice in Nevada. However, the Nevada Committee affirmatively concluded Mr. Garen's use of the letterhead did *not* constitute the unauthorized practice of law. The Washington committee made no objective finding of immoral conduct but seems to whisper sotto voce this was a factor which "further exacerbate[s] the committee's doubts." CP at 7. But one should not be denied a professional license simply because of "doubts". This court must demand facts.

Mr. Garen testified he did not use the letterhead to solicit legal business in Nevada nor to communicate with Nevada lawyers. He did, however, use the letterhead to communicate with lawyers in California and Texas, jurisdictions where Mr. Garen was licensed to practice law. Such was expressly disclosed on the face of the letterhead.

The letterhead was never even the subject of a complaint before the Nevada Committee. In fact, Mr. Garen volunteered the letterhead himself. Mr. Garen concluded, "Sloppy letterhead without any intent or act of wrongdoing proves that I did not pay proper attention to the preparation of my letterhead; not that I lack good moral character." CP at 13.

Mr. Garen testified he believed listing the jurisdictions in which he was admitted necessarily implied that he was not admitted in all other jurisdictions. Our court is familiar

with the maxim *expressio unius est exclusio alterius* and frequently applies it to discern governmental intention, e.g., *State ex rel. Port of Seattle v. Department of Pub. Serv.*, 1 Wn.2d 102, 112, 95 P.2d 1007 (1939). If such is a legitimate mode of expression for the Legislature, I would not double the standard for Mr. Garen. Certainly this was not a misrepresentation by intent. Once Mr. Garen realized the alleged problem he took steps to correct it. He no longer uses the letterhead. He acted with dispatch, evincing a concern with maintaining the highest ethical standards. The problem with his letterhead does not show bad moral character.

This factor does not rebut Mr. Garen's prima facie showing.

Business License

This is truly absurd. Mr. Garen operated a "900" business from his home, where a computer answered incoming telephone calls and dispensed information for "The Las Vegas JACKPOT of Information." CP at 292. The Nevada Committee found Mr. Garen had made an anonymous inquiry with county authorities concerning the necessity of a business license. The county told him he did not need a business license for this type of operation. The Nevada Committee concluded Mr. Garen should have filed an application with the county in order to receive a definitive determination. The Washington Committee cited this as another factor with "further exacerbate[d] the committee's doubts." CP at 7.

Clark County, Nevada, regulators, where Mr. Garen's "900" number operation originated, never told Mr. Garen he required a license. In fact, the regulators told him the opposite. Nor is there any factual finding from any reviewing committee that he even needed a business license in fact under the Nevada statute nor Clark County, nor Las Vegas ordinances. Yet somehow this is parlayed into a "doubtable" moral failing for not applying for an unnecessary license. That the committee gave any weight at all to this factor is appalling. There is nothing immoral in not applying for a license one does not need. To the contrary, resistance to and suspicion of governmental overstepping is exactly the sort of quality which becomes a lawyer.

> To force the Bar to become a group of thoroughly orthodox, time-serving, government-fearing individuals is to humiliate and degrade it.
>
> But that is the present trend, not only in the legal profession but in almost every walk of life. Too many men are being driven to become government-fearing and time-serving because the Government is being permitted to strike out at those who are fearless enough to think as they please and say what they think.

In re George Anastaplo, 366 U.s. 82, 115-16, 81 S. Ct. 978, 996, 6 L.Ed.2d 135 (1961)(Black, J., dissenting).

The business license factor does not rebut Mr. Garen's prima facie showing of good moral

character.

Litigation and Bankruptcy

I have linked these two factors together because the Federal Bankruptcy Code preempts any consideration of these factors by either the committee or us.

Mr. Garen filed chapter 7 bankruptcy in 1986. On supplemental Schedule B-2--Personal Property to his bankruptcy petition, Mr. Garen stated he had an action then pending in Los Angeles Superior Court against Thomas Loegering, a former business partner. Messrs. Garen and Loegering traced cross-complaints. Loegering claimed Mr. Garen owed him between $300,000 and $600,000, and Mr. Garen claimed Loegering owed him $100,000. In his bankruptcy petition, Mr. Garen declared "the cash value of this case on the date of filing [is] $1,000.00." CP at 348. At the first meeting of creditors, the bankruptcy trustee examined Mr. Garen extensively about the worth of the lawsuit, and then abandoned the asset back to Mr. Garen. CP at 14.

The Loegering case eventually went to trial and a judgment entered in May 1990. In its special verdict form, the jury found Loegering did not commit fraud against Mr. Garen and was not liable to Mr. Garen for any amount of money. The jury awarded Mr. Garen's mother, who was also a cross-complainant in the suit, $205,000 in damages. CP at 364. The jury awarded Loegering $5,424.00 in costs and disbursements against Mr. Garen. CP at 366. In view of the costs awarded Mr. Loegering at trial, it would seem Mr. Garen *overvalued* said suit by $1,000 on his bankruptcy schedule, not to mention he was

in the red zone anyway as a result of having to pay the costs awarded Loegering.

While an appeal was pending in the Loegering case, Loegering decided to cut his exposure and settle with Mr. Garen and Mr Garen's mother. Loegering's only asset was rental property, and Mr. Garen's mother did not with to own such property. Mr. Loegering therefore settled the suit by transferring two pieces of rental property to Mr. Garen, and Mr. Garen represented to the Committee that the estimated worth of the property he received from Mr. Loegering was $750,000.

The committee's comment that Mr. Garen's claim on the bankruptcy petition that "the Loegering decision had limited value (when, in fact, it was subsequently settled for a substantial sum)" misrepresents the time and place in which the original statement of estimated value was made. After all, the trial court awarded him nothing (four years after the bankruptcy petition in question was filed) he was ordered to pay Loegering's costs of over $5,000.00. That he could not have foreseen a "substantial" settlement on appeal of the judgment does not appear to have been part of the committee's considerations.

Another issue addressed by the committee concerning bankruptcy involved a "900" business from which Mr. Garen eventually earned substantial amounts. In his bankruptcy petition, Mr. Garen claimed the "900" number business was not his, but instead belonged to his mother. In its opinion, the committee rather cryptically noted, both with regard to this issue and the Loegering litigation, that Mr. Garen's "representations... to the bankruptcy court were greatly at odds with Mr.

Garen's apparent financial success." CP at 4. In addition, such "conduct within the ... bankruptcy court system[] further exacerbate[d] the committee's doubts." CP at 7. Doubts. Not facts. "Doubts" might arise because the committee didn't understand the facts or the legal consequences--but that is not the same as a practice which has doubtful morality.

Mr. Garen counters that he did not disclose the "900" business to the bankruptcy court for two reasons: one, it was a "976", not a "900" business; and two, his mother owned the business, not him. While his mother employed Mr. Garen as the president of the company, the "976" business was in fact owned in whole by Oregon Properties, Inc., of which Mrs. Garen was the sole stockholder. In 1989, two years after his declaration of bankruptcy, a company owned by Mr. Garen purchased the business from his mother's corporation.[7]

The final issue addressed by the committee about Mr. Garen's actions in bankruptcy concerned an objection by a creditor to a Chapter 11 bankruptcy petition submitted by Mr. Garen. The creditor objected to lines of credit extended to Mr. Garen in excess of $250,000, which the committee stated was based on real property which Mr. Garen had acquired from his parents. According to the committee's opinion, Mr. Garen then transferred title back to his parents after receiving the credit. Mr. Garen recorded neither transfer. In the end, Mr. Garen voluntarily dismissed the chapter 11

---

7. Mr. Garen mistakenly testified in front of the committee that he, and not a corporation he owned, purchased the business in 1989.

petition.

Although it is somewhat "doubtful" as to what exactly occurred, Mr. Garen disagreed with the committee's findings and noted that the creditor withdrew its objection, and also noted that he eventually paid this creditor in full. No doubt about that.

It is difficult to refute any conclusions of the committee on this point because it never declared in what way it found these three transactions objectionable or indicative of bad moral character. The committee provided no specific findings of wrongdoing. Rather, these transactions merely exacerbated "the committee's doubts." CP at 7.

Mr. Garen correctly notes that no one ever accused him of committing bankruptcy fraud or withholding assets from the bankruptcy court. In his petition to this court, Mr. Garen states the committee concluded he had "committed bankruptcy fraud." CP at 14. The Washington State Bar Association, in its reply brief, correctly notes, however, that these transactions merely exacerbated the committee's doubts. The Bar does not feel the need to explain how, why or to what extent these transactions were weighted in their determination that Mr. Garen did not possess good moral character. Mr. Garen correctly asserts there is nothing morally wrong with any of these transactions, unless on were to penalize Mr. Garen for his post-bankruptcy financial success, as Mr. Garen must have done something wrong because he became a financial success after having declared financial failure. To the contrary, such experience might commend Mr. Garen to any number of any number of clients

who might seek his assistance so they could follow suit.

No matter what weight the committee placed on any of these transactions, however, it did not have the authority to weigh these matters at all. The committee (and the Bar Association and this court) is preempted from examining any aspect of these transactions by the Supremacy Clause of the United States Constitution because they occurred during the course of a federal bankruptcy case.

11 U.S.C.A **Ss** 525 is entitled "Protection against discriminatory treatment" and provides:

> (a)...[A] governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act...solely because such bankrupt or debtor is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act, has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was

discharged under the Bankruptcy Act.

The historical and statutory notes to section 525 clarify Congress's intent in passing this section:

> [T]he section is not exhaustive. The enumeration of various forms of discrimination against former bankrupts is not intended to permit other forms of discrimination... This section...prohibit[s] actions by governmental or quasi-govermental organizations that perform licensing functions, *such as a State bar association* or a medical society, or by other organizations that can seriously affect the debtors' livelihood or fresh start...

11 U.A.C. **Ss** 525, Historical and Statutory Notes (emphasis added).

Article VI, clause 2 of the United States Constitution provides "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof...shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." From this a clause, the doctrine of preemption derived. *Goodwin v. Bacon*, 127 Wn.2.d 50, 57 896 P.2d 673 (1995). The goal in a preemption analysis is determination of congressional purpose. *Id.* While there is a strong presumption against finding preemption, courts will declare a state law preempted where it stands as an obstacle to

the purpose and objectives of Congress. *Inlandboatmen's Union of the Pac. v. Department of Transp.*, 119 Wn.2d 697, 707, 836 P.2d 823 (1992).

The United States Constitution grants to Congress the power "to establish. . .uniform Laws on the subject of Bankruptcies throughout the United States ..." U.S. Const. Art. I, **Ss** 8, cl. 4. The purpose of the federal bankruptcy laws "is to give debtors `a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt.'" *Perez v. Campbell*, 402 U.S. 637, 648, 91 S. Ct. 1704, 1710-11, 29 L. Ed. 2d 233 (1971)(quoting *Local Loan Co. v. Hunt*, 292 U.S. 234, 244, 54 S. Ct. 695, 699, 78 L. Ed. 1230 (1934), *superseded by statue as stated in In re Saunders*, 105 B.R. 781, 56 Ed. Law Rep. 1225 (1989). To this extent, Congress enacted **Ss** 525, which effectively codified the nondiscrimination ruling in *Perez*.

This court has used the preemption doctrine in the past to restrict the power of the organized Bar to set conditions on readmissions which conflict with the purpose of the bankruptcy law. *In re Batali*, 98 Wn.2d 610, 618-19, 657 P.2d 775, 39 A.L.R. 4th 577 (1983)(Bar requirement that disbarred attorney repay debts preempted where it stands as an obstacle to the purpose and objectives of Congress. *Inlandboatmen's Union of the Pac. v. Department of Transp.*, 119 Wn.2d 697, 707, 836 P.2d 823 (1992).

In re Clark Garen, Bar Applicant
B.A. Number 61

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The Washington State Bar Association, the Committee on Character and Fitness, and this court cannot be the ultimate arbitrators of whether a person may pursue a discharge in bankruptcy. The United States Constitution and the federal bankruptcy code place that responsibility firmly within the hands of the bankruptcy judges. Anything which interferes with the bankruptcy court's duties and responsibilities to that extent is preempted

under the Supremacy Clause.

Consequently, I fid this factor does not rebut Mr. Garen's prima facie showing because the committee has no right to even question Mr. Garen on any matter concerning his discharge in bankruptcy in the first place. I find no moral flaw in any event.

Belinda Manning Litigation

This issue apparently arose out of a false arrest suit that occurred on property owned by Mr. Garen. The committee noted the suit, and rather cryptically stated "[Mr. Garen's] conduct within the civil... court system[] further exacerbate[s] the committee's doubts." CP at 7. Mr. Garen asserted he did not remember anything about the case and assumed it had been discharged in bankruptcy.

Why did the committee even bring out this issue? There are no details concerning the litigation, no one has made any claim that Mr. Garen acted in an immoral manner, and Ms. Manning did not provide any testimony to the committee. Yet the committee identified this pertaining to Mr. Garen's good moral character. It apparently exacerbated the committee's *doubts*. How? Why? Maybe the committee doesn't know and therefore "doubts" what it is doing. This State's highest court should not be in the business of divining the committee's intent based on vague incantations. I am certainly not going to be the justice to deny Mr. Garen his chosen profession on this fantasy.

This factor does nothing to rebut Mr. Garen's prima facie case.

California Bar Problems

In its response brief to Mr. Garen's petition, the committee states it made no conclusions regarding these matters, yet the committee's opinion references them. Mr. Garen was the subject of seven Bar procedures, a large number of which were instigated by creditors represented by counsel whom Mr. Garen had contacted in the course of his representation of a collection agency. None resulted in any discipline, and no client has ever filed a complaint against Mr. Garen. Sometimes an attorney who zealously represents his clients angers his adversaries because he is doing a good job.

Once again, the committee brought this matter up, but made no specific finding or conclusion of immoral conduct. The issue therefore does not rebut Mr. Garen's prima facie case.

Telling the "Technical Truth"

In his application to the Washington Bar, while awaiting the decision of the Nevada Committee on Character and Fitness, Mr. Garen wrote he was awaiting admission in Nevada. Mr. Garen later explained in a letter to Committee General Counsel Robert Weldon that he reported his status as such because "I believed I had satisfied my burden of proof before the Nevada Committee, [and] I was of the belief that I would receive a favorable recommendation upon [the Nevada Committee's] receipt of the certificate [of good standing] from California." CP at 192. Apparently referring to this matter, the Character and Fitness Committee concluded:

"Mr. Garen's apparent lack of candor makes the committee somewhat apprehensive. It appears as though Mr. Garen usually tells the technical truth, yet a lack of openness and candor is apparent both through the letters and responses to questions given to him by the committee." CP at 7.

Leaving aside how one would tell nontechnical truth, and the unusually large number of qualifiers in the committee's conclusion ("apparent," "Somewhat," "appears"), Mr. Garen stated he believed the Nevada proceedings were a pro forma procedure which he would need to complete before he was admitted to the Bar in that state. Mr. Garen first came to the notice of the Nevada Committee on Character and Fitness because he petitioned for a waiver of the Nevada rule which requires all applicants to graduate from ABA accredited schools. He was sent to its Functional Equivalency Committee, which noted the problems with his stationary letterhead mentioned above. The Functional Equivalency Committee forwarded Mr. Garen to the Committee on Moral Character and Fitness, which conducted a hearing. At the close of the hearing, the Committee on Moral Character and Fitness informed him it would keep his case open until it received a certificate of good standing for Mr. Garen.

Without "doubt" Mr. Garen honestly believed he satisfied his burden of proof during the course of the hearing in Nevada and that he would be admitted to the Nevada Bar at the time he filled out his Washington application. What he reported on his bar application in Washington was factually accurate and honest. But what the committee apparently wanted in hindsight was for Mr. Garen to disclose the worst possible

scenario regarding his application in Nevada. While perhaps it would have been wise for Mr. Garen to have done so (to deal with "doubts"), we are concerned here with whether his failure to disclose the worst case scenario overcomes his prima facie showing of good moral character. It is clear this omission, if one could call it that, does not. Failure to answer questions that are not asked bespeaks a problem with the inquisitor, not dishonesty on the part of the inquisitee.

Courts in other jurisdictions have admitted applicants with far more serious omissions, finding such omissions failed to overcome the applicant's showing of good moral character. *See Reese v. Board of Comm'rs*, 379 So. 2d 564, 568-69 (Ala. 1980)(applicant granted admission after failing to disclose arrests because failure did not rebut applicant's prima facie case established by letters of recommendation by judges and lawyers); *In re Waters*, 84 Nev. 712, 447 P.2d 661, 663 (1968) (applicant admitted after disclosing he had been dismissed form one law school, when he had been dismissed from two, when lack of detail did not constitute "an intentional deception."); *In re Klahr*, 102 Ariz. 529, 433 P.2d 977, 979 (1967) (applicant admitted after failing to disclose existence of two law suits because, while failure was "poor judgment," it was not "sufficient to constitute a lack of good moral character.")

Perhaps in hindsight Mr. Garen should have volunteered more, however, that does not demonstrate the intentional deception necessary to overcome Mr. Garen's proof of good moral character.

Conclusion

Oscar Wilde once said, "Morality is simply the attitude we adopt toward people whom we personally dislike"[8] Given there was no real evidence of bad moral character on Mr. Garen's part, perhaps this explains why the committee did not recommend that Mr. Garen be admitted. I can find no other.

> Throughout its history, the moral fitness requirement has functioned primarily as a cultural showpiece. In that role, it has excommunicated a diverse and changing community, variously defined to include not only former felons, but women, minorities, adulterers, radicals, and bankrupts...In the absence of meaningful standards or professional consensus, the filtering process has proved inconsistent, idiosyncratic, and needlessly intrusive. We have developed neither a coherent concept of professional character or effective procedures to predict it. Rather, we have maintained a licensing ritual that too often had debased the ideals it seeks to sustain.

---

8. Quoted in Mark R. Privatsky, *A Critical Review Culminating in Practical Bar Examination Application Techniques in Regards to the "Good Moral Character Requirement"--In re Majorek*, 244 Neb. 595, 508 N.W.2d 273 (1993), 74 Neb. L. Rev e24, 325 (1995)

Deborah L. *Rhode, Moral Character as a Professional Credential*, 94 Yale L.J. 491, 493-94 (1985).

Mr. Garen has proven a prima facie case of good moral character. The character and Fitness Committee has provided no express findings to the contrary. He is, and has been, an attorney in good standing for many years in both California and Texas. I, for one, would welcome him to practice in this State. I request publication of this dissent.[9]

/s/ Sanders, J.

I agree that Mr. Garen should be admitted to the Bar based on comparisons with others whom this court has licensed to practice law. It is also significant that no client has complained or filed a malpractice action against Mr. Garen in the 25 years he has been licensed to practice.

/s/ Madsen, J.

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9. By majority vote the court has denied my request to publish.

Exhibit A

RECEIVED
JULY 22, 1996
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BEFORE THE CHARACTER AND FITNESS COMMITTEE
OF THE WASHINGTON STATE BAR ASSOCIATION

In Re: CLARK GAREN Bar Applicant,	) OPINION OF THE) CHARACTER AND) FITNESS COMMITTEE

This matter was heard by the Character and Fitness Committee at the Washington State Bar Association Offices, Westin Building, 2001 Sixth Avenue, Seattle, Washington on March 30, 1996.

Committee members present were: Edward G. Holm, Shelley J. Hickey, Christina A. Meserve, Pamela J. Bartlett, Daniel D. Zender, Francis J. Kennedy, Deborah Russell, Curman M. Sebree, John T. John, and Dianne Ward Turk. The Bar Association was represented by Robert D. Welden, General Counsel. Clark Garen, the Bar applicant, was present and represented himself.

FACTUAL BACKGROUND

Clark Garen was born September 11, 1946, and was admitted to the practice of law in California in 1972 and in Texas in 1985. He graduated from the University of West Los Angeles School of Law, which is not an approved law school. He therefore applies to the Washington State Bar Association under the provision of APR 3(B) (iii), which provides that to qualify to sit for the Bar examination, an applicant must be admitted to the practice of law and be in current good standing in another state, and have had active legal experience for

at least three of five years immediately preceding filing of a Washington Bar application.

Nevada Proceedings:

On March 9, 1994, a hearing was held on Mr. Garen's application to the Nevada Bar Association. In its findings denying Mr. Garen's petition for waiver, the Committee raised issues regarding Mr. Garen's activities. On August 19, 1994, an additional hearing was held in front of the Character and Fitness Committee of the Nevada State Bar, who denied Mr. Garen's admission on January 6, 1995. This denial was based on Mr. Garen's failure to satisfy tax liens in Los Angeles County, resulting from the sale of real property. The Committee also felt there was a lack of candor in Garen's failure to obtain a business license in connection with a "900" number commercial telephone business, along with his use of ambiguous letterhead with a Las Vegas address.

On October 5, 1995, the Nevada Supreme Court entered an Order denying Mr. Garen's petition appealing the decision. The United States Supreme Court was petitioned for writ of certiorari, which has now been denied.

A summary of the problems identified by the Nevada Bar is as follows:

1. Tax Liens: Mr. Garen admits to having tax liens of a few thousand dollars in Los Angeles County that have been in force since 1990. He testified in Nevada that he had no intention of discharging or challenging the validity of the liens. He would allow them to languish, and if he sold any other real property in California, he would pay the liens at that time. This is still his position, he considers it his own affairs, and feels it is no one else's business.

2. Unauthorized Practice: Mr. Garen used the following letterhead when living in Las Vegas:

CLARK GAREN
ATTORNEY AT LAW
ADVERTISING AGENCY
1212 South Casino Center Blvd.
Las Vegas, Nevada 89104

There is no limiting language as to the fact that Mr. Garen is not admitted to practice in Nevada. Nonetheless, the Nevada Committee concluded that the ambiguity raised was not sufficient to conclude that Mr. Garen engaged in the unauthorized practice of law in the State of Nevada.

3. Business License: Mr. Garen maintained a 900 telephone number business, which he ran out of his Las Vegas home, without a city or county business license. Mr. Garen determined that what he was doing was not running a business within any ordinary terms of the word, and did not get a business license.

The following matters were also disclosed on the Washington Bar application.

4. Loegering Litigation: Mr. Garen was involved in a suit involving a limited partnership with Thomas J. Loegering. In 1983, the property went into foreclosure, and the parties brought litigation against each other. Mr. Garen felt that each of the parties were somewhat victorious. Mr. Garen's cross-complaint against Loegering was dismissed and Ruth Garen (the applicant's mother) was awarded a verdict for $455,000.00 against Loegering, plus $35,177.00 in costs. Following the verdict, a settlement was entered into on May 14, 1990, in which Loegering transferred two parcels of real estate to Mr. Garen, and the judgment was satisfied.

5. Bankruptcy: In 1986, Mr. Garen filed a Chapter 7 bankruptcy which grew out of his difficulties in his real estate partnership. Loegering filed a fraud claim in the proceeding. An order of discharge was entered on July 22, 1987 and the matter was closed on August 20, 1987. In his bankruptcy proceeding, Mr. Garen claimed that the Loegering litigation had limited value (when, in fact, it was subsequently settled for a substantial sum) and that the "900" businesses were not his assets. The representations made to the bankruptcy court were greatly at odds with Mr. Garen's apparent financial success.

Mr. Garen had also disclosed that he had filed a Chapter 11 bankruptcy petition in 1983. An objection was filed by a creditor concerning credit lines which Mr. Garen had obtained in excess of $250,000.00. The extension of credit was based on real property which he says he had acquired from his parents and transferred back to them after obtaining the loan. Neither of the transfers were recorded. The Chapter 11 was dismissed after Mr. Garen deeded his residence to Village Bank in exchange for the cancellation of his debt.

6. Belinda Manning Litigation: This litigation is based on a false arrest suit. Manning had sued and the suit was stayed during a bankruptcy and apparently was resolved in the bankruptcy.

7. Other Bar Problems: Mr. Garen indicated in his application that because he represented collection agencies, five to ten complaints have been filed by the State Bar of California against him, and they were all dismissed. The State Bar of California indicates that sever complaints were filed against Garen in 1994. One complaint concerning a collection matter was closed with a warning letter concerning communication of a party known

to be represented by counsel, and a second was closed with an admonition in 1990 concerning failure to communicate with a client. A third matter resulted in a warning letter in 1992, concerning a contract with a party represented by counsel. All other matters were closed without further action.

Washington Proceedings: Mr. Garen's application to the Washington Bar, signed on November 1, 1993, indicated that he had been admitted in Texas and California, and that he had passed the Nevada Bar Exam and was awaiting admission there. At that time, Mr. Garen was in fact waiting for the decision of the Nevada Character and Fitness Committee, which decision was issued denying his admission on January 6, 1995. In February of 1995, counsel for our Bar association wrote Mr. Garen regarding his failure to disclose the denial of admission in Nevada. In his response of May 11, 1995, Mr. Garen stated as follows:

> The State Bar of Nevada has recommended to the Court that I not be admitted. Under Nevada law, the State Bar of Nevada only makes recommendations to the Court. The Nevada Supreme Court makes final decisions on all admissions questions, and I am not considered to have been denied admission until I either fail to timely file a Petition with the Nevada Supreme Court make a final decision with respect to my Petition. At this time, I have not been denied admission to the State Bar of Nevada.
>
> I did not immediately advise Washington of these proceedings for three reasons. The first was that there was nothing to report but the existence of proceedings. The second reason was that I thought the Nevada situation

would be resolved prior to the availability of Washington results. The third reason was that I had not yet passed the Washington Bar Examination, and until I had passed the Washington would be taking no further action.

The Nevada proceedings were made part of the Washington record and the committee spent a substantial portion of the hearing dealing with problems raised in those hearings.

RECOMMENDATION

The committee respectfully recommends that Mr. Garen not be allowed admission to the Washington State Bar Association.

Under APR 3 (a), Mr. Clark Garen has the burden of establishing that he is of good moral character, and under APR 3(b), that he has active legal experience for at least 3 of 5 years immediately preceding the filing of the application. It is the committee's opinion that he did not carry this burden.

Under APR 39 (c) (iii), if the applicant "...has previously been denied admission to the Bar in this or any other jurisdiction for reasons other than failure to pass a Bar examination" the burden of demonstrating good moral character rests on the applicant, and it is ultimately up to the Supreme Court to determine whether the Bar applicant meets that burden. The problems which are set out in the factual summaries above seem not to concern Mr. Garen, although the committee feels they are very serious indications of the applicant's character.

Mr. Garen's apparent lack of candor makes the committee somewhat apprehensive. It appears as though Mr. Garen usually tells the technical truth, yet a lack of openness and candor is apparent both through the letters and responses to questions given to him by the committee.

Mr. Garen's cavalier attitude in reference to the tax liens indicate his disregard and disrespect for the lawful process. His handling of his affairs with the use of misleading stationary, problems with his business license, and his conduct within the civil bankruptcy court systems further exacerbate the committee's doubts.

CONCLUSION

In conclusion, it is the Committee's opinion that the applicant did not carry the burden of proof required to convince the Committee members that his application should be approved, and the Committee recommends that he be denied admission to the Washington State Bar Association.

/s/ Daniel D. Zender
Daniel d. Zender, Chair
Character and Fitness Committee

Supreme Court, U.S.
FILED
JUL 7 1997
OFFICE OF THE CLERK

(2)

No. 96-1930

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

CLARK GAREN,
Petitioner,

v.

SUPREME COURT OF WASHINGTON,
WASHINGTON STATE BAR ASSOCIATION,
Respondents.

On Petition for Writ of Certiorari to the Washington Supreme Court

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BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether denial of an application for admission to the Washington state bar for failure to carry applicant's burden of proof to establish that he is of good moral character; for lack of candor in discussing issues; and for lack of concern regarding problems raised in applicant's unsuccessful application for admission to the Nevada state bar; raises a substantial question regarding the applicant's rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution?

2. Whether a bare allegation that Washington applies different standards to evaluate the moral character and fitness of different bar applicants is sufficient to establish a violation of the Fourteenth Amendment to the United States Constitution?

3. Whether a finding that an applicant for admission to the bar in Washington has not established that he is of good moral character violates an applicant's rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution unless it is based on a finding of conduct by the applicant that would constitute either a felony, a serious misdemeanor, or a criminal act?

4. Whether a bar admission proceeding which provides for notice, hearing, presentation of witnesses, and appeal violates guarantees of procedural due process under the Fifth and Fourteenth Amendments to the United States Constitution?

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IN THE

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On Petition for Writ of Certiorari to the Washington Supreme Court

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BRIEF IN OPPOSITION

JURISDICTION

This Court does not have jurisdiction over this matter pursuant to 28 U.S.C. 1254(1) because it does not involve a case in the courts of appeals as required by that section.

STATEMENT OF THE CASE

A. Procedural History of the Case

Petitioner first sat for the Winter, 1994, Washington bar examination, which he failed. He took the Winter, 1995 bar examination. After that exam, it was learned that Petitioner was awaiting a decision from the Nevada Committee on Moral Character and Fitness on his application for admission in that state. His Washington bar examination results were not released to him pending an investigation of the circumstances leading to the Nevada

proceeding. On October 5, 1995, the Nevada Supreme Court denied Petitioner's admission. He filed a writ of certiorari with the United States Supreme Court which was denied.

A hearing before the Character and Fitness Committee of the Washington State Bar Association was held on March 30, 1996. In advance of the hearing, Petitioner was provided with a memorandum from bar counsel to the Committee which discussed the issues of concern regarding Petitioner's moral character and fitness to practice law. On July 22, 1996, the Character and Fitness Committee entered an opinion recommending that Petitioner not be admitted to the practice of law in Washington. A copy of that opinion is at Appendix A.

The reasons stated for this recommendation include that Petitioner failed to carry his burden of establishing that he is of good moral character as required by Washington Admission to Practice Rule 3(a); that problems raised in Petitioner's unsuccessful application for admission to the State Bar of Nevada "seem not to concern [Petitioner], although the committee feels that they are very serious indications of the applicant's character"; that Petitioner's "lack of candor makes the committee somewhat apprehensive"; that Petitioner's "lack of candor" regarding an issue of tax liens "indicate his disregard and disrespect for the lawful process"; and that his handling of other matters "further exacerbate the committee's doubts."

Petitioner appealed from that recommendation to the Board of Governors of the Washington State Bar Association. On October 4, 1996, the Board of Governors affirmed the recommendation of the Character and Fitness Committee.

Petitioner filed a Petition for Review of that decision with the Supreme Court of Washington. On March 6, 1997, the Supreme Court entered an order denying the petition for review. On May 20, 1997, a dissent was filed by one of the nine Justices of the Washington Supreme Court, joined in by one additional Justice.

B. Statement of Relevant Facts

The facts relevant to this bar admissions proceeding are set out in the Memorandum dated January 24, 1996, attached as Appendix B.

REASONS FOR DENYING THE PETITION

I. Petitioner has failed to properly invoke the jurisdiction of this Court.

Petitioner cites 28 U.S.C. 1254(1) as the basis for jurisdiction of this Court to consider this petition. That section provides for appeal from "cases in the courts of appeal." This appeal is from a case in the Supreme Court of Washington. Petitioner should properly have invoked jurisdiction pursuant to 28 U.S.C. 1275(a).

In addition, although not controlling, Petitioner cites no decision of the state court which has decided an important federal question in a way which conflicts with any other court decision, nor an important question of federal law that has not, but should be, settled by this court. Supreme Court Rule 10.

II. Denial of an application for admission to the Washington state bar for failure to carry applicant's burden to establish that he is of good moral character; for lack of candor in discussing issues; and for lack of concern regarding problems raised in applicant's unsuccessful application for admission to the Nevada state bar; does not raise a substantial question regarding the applicant's rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

Petitioner bases his assertion that his Fourteenth Amendment due process and equal protection rights have been violated essentially on the dissent in this 7 to 2 decision of the Washington Supreme Court. However, other than citing this disent, he asserts no facts nor legal authority to support his position.

For purposes of meeting due process requirements, the issue is whether the Supreme Court of Washington on the record presented could reasonably find that Petitioner had not shown good moral character. *Schware v. Board of Bar Examiners*, 353 U.S. 232, 77 S.Ct. 752 (1957). Here, there is no question but that the record supports the Committee's and the Supreme Court's decision. The basis for finding that Petitioner had not met his burden of establishing good moral character was, first, his lack of concern for the very problems which led to Petitioner's unsuccessful application for admission to the Nevada Bar. In addition, the Committee found that Petitioner's lack of candor about his tax liens indicate his disrespect for the lawful process. Those findings are well grounded in the record and clearly form a reasonable basis to find that "Petitioner had not shown good moral character."

Neither Petitioner nor the dissenting opinion of the Washington Supreme Court on which he relies presents any argument or authority for the proposition that Petitioner's equal protection rights have been violated.

III. A bare allegation that Washington applies different standards to evaluate the moral character and fitness of different bar applicants is not sufficient to establish a violation of the Fourteenth Amendment to the United States Constitution.

Petitioner argues that the fact that the Washington Supreme Court has previously admitted seven bar applicants who had been convicted of criminal offenses demonstrates that that Court applied different standards in evaluating those applicants and in evaluating Petitioner's application.

To the contrary, the Washington Supreme Court applies the same standards for evaluating every bar applicant. Those standards are:

> (1) the nature and character of the prior misconduct; (2) the sufficiency of the punishment undergone in connection therewith, and the making or

> failure to make restitution where required; (3) the applicant's attitude, conduct, and reformation subsequent to the prior misconduct; (4) his current proficiency in the law; and (5) the sincerity, frankness, and truthfulness of the applicant in presenting and discussing the factors relating to his prior misconduct and present admission.

In re Belsher, 102 Wn.2d 844, 852, 689 P.2d 1078 (1984). As the Washington Supreme Court has stated in a reinstatement after disbarment case as a "threshold consideration":*

> The major consideration in reinstatement proceedings is whether the disbarred attorney has overcome those weaknesses which produced the earlier misconduct. . . . No attorney who has failed to overcome those weaknesses that produced the conduct for which he or she was disbarred is fit for reinstatement.

In re Hart, 118 Wn.2d 280, 822 P.2d 294 (1992).

Thus, while the "the nature and character of the prior misconduct" is *one* factor to be considered in evaluating the moral character of a bar applicant, the applicant's *current* moral character is the issue in an admission proceeding.

Those standards were applied by the Character and Fitness Committee in making their recommendation, and it is Petitioner's failure to carry his burden pursuant to those standards which resulted in that recommendation. Petitioner has not shown that those standards were applied differently in any other case. The fact that in dissenting from the majority decision in this case, two members of the Washington Supreme Court were of the opinion that Petitioner had met his burden is not a basis for asserting a lack of due process or equal protection.

---

* [I]t is entirely appropriate for us to look to reinstatement cases for guidance in determining whether [a bar applicant] has met his burden of demonstrating good moral character." *Belsher*, at 851.

> From a profession charged with such responsibilities there must be exactly those qualities of truth-seeking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that have, throughout the centuries, been compendiously described as "moral character."

Schware v. Board of Bar Examiners, supra, at 247 (Frankfurter, concurring).

IV. A finding that an applicant for admission to the bar in Washington has not established that he is of good moral character which is not based on a finding of conduct by the applicant that would constitute either a felony, a serious misdemeanor, or a criminal act does not violate an applicant's rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

As Petitioner notes, this Court has rejected a prior challenge to the requirement that an applicant for the bar be of good moral character. *Law Students Civil Rights Research Council, Inc. v. Wadmon,* 401 U.S. 154, 91 S.Ct. 720, 27 L.Ed.2d 749 (1971). Only where it can be shown that the state has acted arbitrarily or discriminatorily can a Petitioner establish that his due process and equal protecion rights have been violated.

> A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualication must have a rational connection with the applicant's fitness or capacity to practice law. . . . Even in applying permissible standards, officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory.

Schware v. Board of Bar Examiners, supra, at 239.

Other than chastising this Court for its earlier refusal to accept Petitioner's Petition for Writ of Certiorari from

the Nevada Supreme Court's denial of Petitioner's admission to that bar, Petitioner has cited no facts or authority to support any argument that a bar applicant may not be denied admission to practice unless "based on a finding of conduct by the applicant that would constitute either a felony, a serious misdemeanor, or a criminal act."

V. A bar admission proceeding which provides for notice, hearing, presentation of witnesses, and appeal does not violate guarantees of procedural due process under the Fifth and Fourteenth Amendments to the United States Constitution.

Petitioner argues that his due process rights were violated by "questioning your Petitioner about numerous issues without notice." He does not cite what those issues were.

In fact, two weeks prior to the hearing before the Character and Fitness Committee, Petitioner was provided a copy of a memorandum from the General Counsel of the Washington State Bar Association to the Character and Fitness Committee. A copy of that memorandum is at Appendix B. That memorandum set out every issue on which Petitioner was questioned by the Committee. Petitioner had *actual* notice of every single issue which was later of concern to the Committee and which is discussed in the Committee's opinion.

CONCLUSION

Petitioner disagrees with the decision of the Character and Fitness Committee of the Washington State Bar Association to deny his admission to the bar. That decision was affirmed by the Board of Governors of the Washington State Bar Association and by seven of the nine members of the Washington Supreme Court.

One of the dissenters, being dissatisfied with the basis for the majority decision to deny Petitioner's admission, speculates that the real reason for that decision was "per-

sonal . . . dislike." Petitioner baldly states that he was "denied admision because they didn't like his personality." However, neither the dissent nor Petitioner cite anything in the record which even remotely suports this impugnment of the motives of the members of the Character and Fitness Committee, the members of the Board of Governors, and the seven majority members of the Washington Supreme Court.

Petitioner has not demonstrated that his Fourteenth Amendment rights of due process and equal protection have been violated. His petition should be denied.

DATED this 7th day of July, 1997.

Respectfully submitted,

ROBERT D. WELDEN
General Counsel
WASHINGTON STATE BAR ASSOCIATION
2101 Fourth Avenue, Fourth Floor
Seattle, WA 98121-2330
(206) 727-8232
Attorney for Respondent Washington State Bar Association

APPENDIX A

BEFORE THE CHARACTER AND FITNESS COMMITTEE OF THE WASHINGTON STATE BAR ASSOCIATION

IN RE: CLARK GAREN,
Bar Applicant,

OPINION OF THE CHARACTER AND FITNESS COMMITTEE

This matter was heard by the Character and fitness Committee at the Washington State Bar Association Offices, Westin Building, 2001 Sixth Avenue, Seattle, Washington on March 30, 1996.

Committee members present were: Edward G. Holm, Shelley J. Hickey, Christina A. Meserve, Pamela J. Bartlett, Daniel D. Zender, Francis J. Kennedy, Deborah Russell, Curman M. Sebree, John T. John, and Dianne Ward Turk. The Bar Association was represented by Robert D. Welden, General Counsel. Clark Garen, the Bar applicant, was present and represented himself.

FACTUAL BACKGROUND

Clark Garen was born September 11, 1946, and was admitted to the practice of law in California in 1972 and in Texas in 1985. He graduated from the University of West Los Angeles School of Law, which is not an approved law school. He therefore applies to the Washington State Bar Association under the provision of APR 3(B)(iii), which provides that to qualify to sit for the Bar examination, an applicant must be admitted to the practice of law and be in current good standing in another state, and have had active legal experience for at least

three of five years immediately preceding filing of a Washington Bar application.

Nevada Proceedings:

On March 9, 1994, a hearing was held on Mr. Garen's application to the Nevada Bar Association. In its findings denying Mr. Garen's petition for waiver, the Committee raised issues regarding Mr. Garen's activities. On August 19, 1994, an additional hearing was held in front of the Character and Fitness Committee of the Nevada State Bar, who denied Mr. Garen's admission on January 6, 1995. This denial was based on Mr. Garen's failure to satisfy tax liens in Los Angeles County, resulting from the sale of real property. The Committee also felt there was a lack of candor in Garen's failure to obtain a business license in connection with a "900" number commercial telephone business, along with his use of ambiguous letterhead with a Las Vegas address.

On October 5, 1995, the Nevada Supreme Court entered an Order denying Mr. Garen's petition appealing the decision. The United States Supreme Court was petitioned for writ of certiorari, which has now been denied.

A summary of the problems identified by the Nevada Bar is as follows:

1. *Tax Liens:* Mr. Garen admits to having tax liens of a few thousand dollars in Los Angeles County that have been in force since 1990. He testified in Nevada that he had no intention of discharging or challenging the validity of the liens. He would allow them to languish, and if he sold any other real property in California, he would pay the liens at that time. This is still his position, he considers it his own affairs, and feels it is no one else's business.

2. *Unauthorized Practice:* Mr. Garen used the following letterhead when living in Las Vegas:

CLARK GAREN
ATTORNEY AT LAW
ADVERTISING AGENCY
1212 South Casino Center Blvd.
Las Vegas, Nevada 89104

There is no limiting language as to the fact that Mr. Garen is not admitted to practice in Nevada. Nonetheless, the Nevada Committee concluded that the ambiguity raised was not sufficient to conclude that Mr. Garen engaged in the unauthorized practice of law in the State

3. *Business License:* Mr. Garen maintained a 900 telephone number business, which he ran out of his Las Vegas home, without a city or county business license. Mr. Garen determined that what he was doing was not running a business within any ordinary terms of the word, and did not get a business license.

The following matters were also disclosed on the Washington Bar application.

4. *Loegering Litigation:* Mr. Garen was involved in a suit involving a limited partnership with Thomas J. Loegering. In 1983, the property went into foreclosure, and the parties brought litigation against each other. Mr. Garen felt that each of the parties were somewhat victorious. Mr. Garen's cross-complaint against Loegering was dismissed and Ruth Garen (the applicant's mother) was awarded a verdict for $455,000.00 against Loegering plus $35,177.00 in costs. Following the verdict, a settlement was entered into on May 14, 1990, in which Loegering transferred two parcels of real estate to Mr. Garen, and the judgment was satisfied.

5. *Bankruptcy:* In 1986, Mr. Garen filed a Chapter 7 bankruptcy which grew out of his difficulties in his real estate partnership. Loegering filed a fraud claim in the proceeding. An order of discharge was entered on July 22, 1987 and the matter was closed on August 20, 1987. In his bankruptcy proceeding, Mr. Garen claimed that the

Loegering litigation had limited value (when, in fact, it was subsequently settled for a substanial sum) and that the "900" businesses were not his assets. The representations made to the bankruptcy court were greatly at odds with Mr. Garen's apparent financial success.

Mr. Garen had also disclosed that he had filed a Chapter 11 bankruptcy petition in 1983. An objection was filed by a creditor concerning credit lines which Mr. Garen had obtained in excess of $250,000.00. The extension of credit was based on real property which he says he had acquired from his parents and transferred back to them after obtaining the loan. Neither of the transfers were recorded. The Chapter 11 was dismissed after Mr. Garen deeded his residence to Village Bank in exchange for the cancellation of his debt.

6. *Belinda Manning Litigation:* This litigation is based on a false arrest suit. Manning had sued and the suit was stayed during a bankruptcy and apparently was resolved in the bankruptcy.

7. *Other Bar Problems:* Mr. Garen indicated in his application that because he represented collection agencies, five to ten complaints have been filed by the State Bar of California against him, and they were all dismissed. The State Bar of California indicates that seven complaints were filed against Garen in 1994. One complaint concerning a collection matter was closed with a warning letter concerning communication of a party known to be represented by counsel, and a second was closed with an admonition in 1990 concerning failure to communicate with a client. A third matter resulted in a warning letter in 1992, concerning a contact with a party represented by counsel. All other matters were closed without further action.

Washington Proceedings:

Mr. Garen's application to the Washington Bar, signed on November 1, 1993, indicated that he had been admitted in Texas and California, and that he had passed

the Nevada Bar Exam and was awaiting admission there. At that time, Mr. Garen was in fact waiting for the decision of the Nevada Character and Fitness Committee, which decision was issued denying his admission on January 6, 1985. In February of 1995, Mr. Garen took the Washington Bar Exam, and on May 3, 1995, counsel for our Bar association wrote Mr. Garen regarding his failure to disclose the denial of admission in Nevada. In his response of May 11, 1995, Mr. Garen stated as follows:

> The State Bar of Nevada has recommended to the Court that I not be admitted. Under Nevada law, the State Bar of Nevada only makes recommendations to the Court. The Nevada Supreme Court makes final decisions on all admissions questions, and I am not considered to have been denied admission until I either fail to timely file a Petition with the Nevada Supreme Court or the Nevada Supreme Court makes a final decision with respect to my Petition. At this time, I have not been denied admission to the State Bar of Nevada.
>
> I did not immediately advise Washington of these proceedings for three reasons. The first was that there was nothing to report but the existence of proceedings. The second reason was that I thought the Nevada situation would be resolved prior to the availability of Washington results. The third reason was that I had not yet passed the Washington Bar Examination, and until I had passed Washington would be taking no further action.

The Nevada proceedings were made part of the Washington record and the committee spent a substantial portion of the hearing dealing with problems raised in those hearings.

RECOMMENDATION

The committee respectfully recommends that Mr. Garen not be allowed admission to the Washington State Bar Association.

Under APR 3(a), Mr. Clark Garen has the burden of establishing that he is of good moral character, and under APR 3(b), that he has active legal experience for at least 3 of 5 years immediately preceding the filing of the application. It is the committee's opinion that he did not carry this burden.

Under APR 39(c)(iii), if the applicant ". . . has previously been denied admission to the Bar in this or any other jurisdiction for reasons other than failure to pass a Bar examination" the burden of demonstrating good moral character rests on the applicant, and it is ultimately up to the Supreme Court to determine whether the Bar applicant meets that burden. The problems which are set out in the factual summaries above seem not to concern Mr. Garen, although the committee feels they are very serious indications of the applicant's character.

Mr. Garen's apparent lack of candor makes the committee somewhat apprehensive. It appears as though Mr. Garen usually tells the technical truth, yet a lack of openness and candor is apparent both through the letters and response to questions given to him by the committee.

Mr. Garen's cavalier attitude in reference to the tax liens indicate his disregard and disrespect for the lawful process. His handling of his affairs with the use of misleading stationary, problems with his business license, and his conduct within the civil and bankruptcy court systems further exacerbate the committee's doubts.

CONCLUSION

In conclusion, it is the Committee's opinion that the applicant did not carry the burden of proof required to convince the Committee members that his application should be approved, and the Committee recommends that he be denied admission to the Washington State Bar Association.

/s/ Daniel D. Zender
DANIEL D. ZENDER, Chair
Character and Fitness Committee

APPENDIX B

[WSBA Logo]

WASHINGTON STATE BAR ASSOCIATION
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Seattle, Washington 98121-2599
Telephone: (206) 727-8210
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Robert D. Welden
General Counsel

Direct Line: (206) 727-8232

TO: CHARACTER AND FITNESS COMMITTEE

FROM: ROBERT D. WELDEN, GENERAL COUNSEL

DATE: JANUARY 24, 1996

RE: In re CLARK GAREN—Bar Applicant

Clark Garen sat for the Winter, 1995 bar examination. After administration of the examination, it was learned that Garen was awaiting a decision from the Nevada Character and Fitness Committee on his application for admission in that state. His Washington bar examination results were not released to him pending resolution of the Nevada proceeding. On October 5, 1995, the Nevada Supreme Court denied Garen's admission. He has filed a writ of certiorari with the United States Supreme Court which is pending.

Personal Background:

Clark Garen, born September 11, 1946, was admitted to practice in California in 1972, and in Texas in 1985. He has never been professionally disciplined in either of those jurisdictions. He graduated from the University of West Los Angeles School of Law, which is not an approved law school.[1] Therefore, he applies under the provisions of

[1] APR 3(b) provides that, among alternative qualifications to sit for the bar exam is graduation from a law school approved by the

APR 3(b)(iii) which provides that to qualify to sit for the bar examination, an applicant must be admitted to practice law by examination and be of current good standing in another state, and have had active legal experience for at least 3 of the 5 years immediately preceding filing of the Washington bar application.

Nevada Bar Application:

Garen applied for a waiver of the Nevada admission to practice rule that bar applicants be graduates of ABA-approved law schools. A hearing was held before the Committee on Functional Equivalency on March 9, 1994. In its findings denying Garen's petition for waiver, the Committee raised certain issues regarding Garen's " 'activities in addition to the practice of law", particularly allegations of deceptively holding himself out as admitted in Nevada. The Committee recommended "a full hearing on the subject in the event that this recommendation is reversed." [2] On June 7, 1994, the Nevada Supreme Court reversed the Committee's decision and granted Garen's application for waiver. However, the Court referred Garen's application to the Committee on Moral Character and Fitness. Garen passed the Nevada bar examination. On August 19, 1994, a hearing was held and the Character and Fitness Committee denied Garen's admission on January 6, 1995.

The Character and Fitness Committee recommended denial of Garen's application for admission. The Committee cited Garen's failure to satisfy tax liens in Los Angeles County resulting from the sale of real property as evidence of failure to establish character and fitness to

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Board of Governors. The Board of Governors only approves those law schools approved by the American Bar Association.

[2] Garen first applied to take the Winter, 1994, Washington bar examination. On that application in response to the question regarding applicants for admission in other jurisdictions, he responded "Nevada 1993—applicantion rejected because I am not an ABA grad—matter on appeal."

practice law in Nevada, and also cited Garen's "lack of candor" regarding failure to obtain a business license in connection with a "900 number commercial telephone business" and use of "ambiguous" letterhead with a Las Vegas address; and his "cavalier attitude" regarding the tax liens.

Garen petitioned the Nevada Supreme Court for review of that decision. On October 5, 1995, the Court entered an order denying the petition. Garen has petitioned the United States Supreme Court for a writ of certiorari, which is pending.

Disclosure of Nevada Admission Proceeding on Washington Bar Application:

Garen signed his application for admission in Washington on November 21, 1994. Question T asks "Have you ever applied for admission or taken a bar examination in any other state . . .?" Garen answered "Texas—admitted; Calif—admitted; Nevada—passed exam, awaiting admission." He was at that time waiting for the decision of the Nevada Character and Fitness Committee, which was issued January 6, 1995.

Garen sat for the February, 1995 Washington bar exam. Sometime thereafter, it came to the attention of the Director of Admissions that Garen had been denied admission in Nevada. On May 3, 1995, bar counsel wrote to Garen regarding his failure to disclose the denial of admission in Nevada.

Garen responded by letter dated May 11, 1995. He stated that he had "no intention of completing my Washington admission procedure prior to making a full disclosure to you of the Nevada situation."

> The State Bar of Nevada has recommended to the Court that I not be admitted. Under Nevada law, the State Bar of Nevada only makes recommendations to the Court. The Nevada Supreme Court makes final decisions on all admissions questions, and

> I am not considered to have been denied admission until I either fail to timely file a Petition with the Nevada Supreme Court or the Nevada Supreme Court makes a final decision with respect to my Petition. At this time, I have not been denied admission to the State Bar of Nevada!
>
> I did not immediate advise Washington of these proceedings for three reasons. The first was that there was nothing to report but the existence of proceedings. The second reason was that I thought the Nevada situation would be resolved prior to the availability of Washington results. The third reason was that I had not yet passed the Washington Bar Examination, and until I had passed Washington would be taking no further action.

Garen was advised that he would not be admitted in Washington until his applicaiton had been submitted to this Committee for hearing.

Nevada Decision Denying Admission:

Tax Liens: Garen testified before the Nevada Character and Fitness Committee that Los Angeles County had filed two tax liens against him from sale of real property in 1990. He appealed the liens, and one was reduced from $276,000 to $232,000. According to the Committee findings, Garen testified that:

> he "had no intention of discharging or challenging the validity of the liens." He indicated that he was going to allow the liens to languish, and if he ever sold any other real property in California he would pay the liens at that time.[3]

The transcript from the August 19, 1994, hearing includes the following testimony regarding these liens:

---

[3] Question G on the Washington bar application asks: "Are there any lawsuits or unsatisfied judgments pending against you?" Garen answered "No".

Q. Are they a legitimate charge? Do you owe the money?

A. I don't think they're legitimate. That's why I haven't paid them. I went through a hearing process and I established that what—I established what I acquired them for. And basically the—I didn't feel I got a fair hearing from the Board on the issue. I was very distressed with the way they did the values.

Q. But you did have a hearing?

A. Yes, I had a hearing.

Q. Presented your cases?

A. I presented my case. I didn't think it was a fair hearing because I felt that the board had already made up their minds in terms of what they were going to do. But I did have a hearing.

Q. And lost.

A. And lost.

Q. Did you take whatever appellate procedures were available to you to challenge that decision?

A. No, I did not.

Q. Now you're going to let it sit?

A. Now I'm going to let it sit. They will eventually end up collecting it when I sell something else in Los Angeles County.

Q. Do you own any other assets in Los Angeles County?

A. No, but I will. I will eventually have a parcel that would basically come to me through inheritance which I will have to sell—I won't have to sell, but I will sell it, and they'll end up getting paid.

Q. Do you think that that attitude towards that legitimate debt or at least one that you haven't thought was challengeable is a good attitude for a lawyer who may lose a case from time to time or have an adverse result for a client, is that the sort of advice you would give your client, don't worry about it?

A. Well, that isn't necessarily the advice I would give my client. I was very upset about it and this is my own affair and this is how I elected to handle it.

Transcript, August 19, 1994, pp. 57-58.

Unauthorized Practice: In addition, issues were raised regarding unauthorized practice in Nevada. Garen used letterhead reading:

CLARK GAREN
ATTORNEY AT LAW
ADVERTISING AGENCY
1212 South Casino Center Blvd.
Las Vegas, Nevada 8910

Above that appeared: "admitted to practice in California and Texas". The Committee noted that "There is no limiting language such as 'Only Admitted' or 'Not Admitted in Nevada' on the letterhead." However, the Committee concluded that "the ambiguity raised by it is not sufficient to conclude that he is participating in the unauthorized practice of law in the State of Nevada.

Business License: Garen also maintained a "900 telephone number" business, which he ran out of his Las Vegas home, identified on his letterhead as:

Clark Garen's
1-900-976-VEGAS
$2.99 per minute

* * *

The Las Vegas
JACKPOT
of Information

Garen had no city or county business license. The Committee noted that "it was unclear from the evidence adduced at the hearing whether or not a business license was and is required to conduct the type of business that the applicant conducts." The Committee found:

The applicant did make an anonymous inquiry with the Clark County business license authority to determine whether, based upon the information the applicant gave Clark County, a County Business license was required. After the anonymous inquiry, the applicant "got the idea that I didn't fit into any of the categories." The applicant never did file an application with either the City of Las Vegas or Clark County business license divisions for a definitive determination of whether or not a business license was required. The applicant determined ". . . that what I was doing was not running a business within the ordinary terms of the words of running a baseness . . ."

The Committee referred to this as Garen's "lack of candor in dealing with the Clark County business license division."

Other Matters Disclosed on Bar Application:

Loegering Litigation: Garen was involved in a real estate limited partnership in Houston with Thomas J. Loegering. In 1983 the property went into foreclosure. Eventually, various parties brought litigation against each other, including a suit brought by Loegering against Garen and Garen sued Loegering. Various allegations of fraud, conversion, and other theories were alleged. A jury trial was held, and according to Garen, "each of us were somewhat victorious . . . the jury only found fraud had been committed by Mr. Loegering." The jury verdict shows, among other awards, that Garen's cross-complaint against Loegering was dismissed and costs were awarded to Loegering for $5,424.00; and Ruth Garen was awarded $455,000 against Loegering, plus $35,177 in costs.

Following the verdict, a stipulated settlement was entered into on May 14, 1990, in which Loegering transferred two parcels of real estate to Garen.

Bankruptcy: In 1986, Garen filed a Chapter 7 bankruptcy proceeding growing out of his difficulties in this real estate partnership. Garen states that Loegering filed a fraud claim in that proceeding. An order of discharge was entered on July 22, 1987 and the matter was closed on August 20, 1987.

Village Bank Litigation: Garen also disclosed that he filed a Chapter 11 bankruptcy petition in 1983. An objection was filed by Village Bank concerning credit lines Garen had obtained in excess of $250,000 based on secured interests in real property which included a piece of property he says that he had acquired from his parents. He says that after issuing his financial statement to the bank, he transferred to property back to his parents. "Neither of the transfers was recorded; we just passed deeds between us." (Letter to bar counsel dated December 26, 1993).

According to Garen, after he dismissed the Chapter 11 proceeding, he deeded his residence to Village Bank in exchange for cancellation of the debt.

Belinda Manning Litigation: In the bankruptcy schedule of creditors, Belinda Diane Manning was listed as having a disputed tort claim for false arrest. In a letter to bar counsel dated February 20, 1994, Garen wrote that he did not remember much about this matter, except that Manning caused a disturbance at some property owned by Garen. He says that he was not present during the incident. The police were apparently called and Manning was arrested.

Manning sued Garen. He says that the suit was stayed during the bankruptcy, and aparently was resolved in the bankruptcy.

Other Bar Grievances:

In the supplement to his 1994 bar application, Garen wrote that "I represent collection agencies, so numerous

(5 to 10) complaints have been filed with the State Bar of California against me by debtors from whom my client has been trying to collect money." According to Garen, those were all dismissed.

On November 3, 1994, the State Bar of California wrote to the State Bar of Nevada summarizing 7 complaints filed against Garen. In 1994, one complaint concerning a collection matter was closed with a "Warning Letter" to Garen concerning communication with a party known to be represented by counsel. A second matter was closed with an Admonition in 1990 concerning failure to communicate with a client. A third matter resulted in a "Warning Letter" in 1992 to Garen concerning contact with a party represented by counsel. All other matters were closed without any other action.

Documentation:

1. Applicant of Clark Garen, Winter, 1995, with attachments.
2. "Miscellaneous Attachments to the Nevada Bar Application . . .".
3. Application of Clark Garen, Winter, 1994, with attachments.
4. Letter from Garen to Bar Counsel dated May 11, 1995.
5. Documents relating to Nevada Bar Application:
   a. Committee on Character and Fitness, Summary of Hearing.
   b. Transcript of Proceedings, August 19, 1994.
   c. Nevada Supreme Court Order Denying Petition.
   d. Petition for Certiorari (part).
6. Letter from State Bar of California, November 3, 1994.

7. Letter from Garen dated December 26, 1993, enclosing Bankruptcy documents.
8. Loegering Jury Verdict (Substitute Judgment) and Settlement Agreement.
9. Letter from Garen dated February 20, 1994, regarding Manning litigation.
10. Letters from Michael B. Farber and James B. Fitzpatrick.

(3)

No. 96-1930

Supreme Court, U.S.
FILED
AUG 19 1997
CLERK

IN THE

UNITED STATES SUPREME COURT
OCTOBER TERM, 1996

CLARK GAREN,

Petitioner,

vs.

SUPREME COURT OF WASHINGTON,
WASHINGTON STATE BAR ASSOCIATION,

Respondents.

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO COMPEL ADMISSION TO STATE BAR OF WASHINGTON

LAW OFFICES OF CLARK GAREN
CLARK GAREN, COUNSEL OF RECORD,
5700 ARLINGTON AVENUE,
RIVERSIDE, CALIFORNIA 92504
(909) 688-0900

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28 U.S.C. 1275(a) — 1

I. JURISDICTION

This Court has jurisdiction over this matter under 28 U.S.C. 1257(a) because this is a final judgment rendered by the highest court of a state where a title, right, privilege, or immunity is claimed under the Constitution of the United States. The Petition cites the wrong Code section, but also cites other authorities establishing jurisdiction. Respondent concedes that this Court does have jurisdiction under 28 U.S.C. 1275(a). Furthermore. this Court considers any issue raised before the lower court, including one presented ineptly. (Konigsberg vs. State Bar of California, 1957 353 U.S. 252, 77 S. Ct. 722, 1 L. Ed. 2d. 810)

II PETITIONER HAS PROVED THAT HE IS VICTIM OF DISCRIMINATION

The essence of the Respondents' opposition is that Petitioner did not prove discrimination.

The Respondent conducts these proceedings in secret and without public disclosure. Neither applicants or members of the public are told why some applicants are admitted and why some applicants are rejected. So, while the Respondent seeks to deprive Petitioner of review by accusing him of failing to prove discrimination, Respondents actively hide and conceal the conduct that would prove their wrongful acts of discrimination.

Respondent fails to cite one single case in which the standard used to evaluate Petitioner was applied to any other bar applicant.

Respondent correctly notes that without the dissenting opinion (which the Washington Supreme Court has kept secret from the public), Petitioner would have no proof that Respondent has discriminated against him.

Fortunately, two justices of the Washington Supreme Court were so disgusted and outraged by the blatant and unjustified discrimination perpetrated upon Petitioner by the majority that they gave proof of their wrongful discriminatory conduct both to Petitioner and to this Court.

On pages 17-18 of Appendix B to the Petition for Certiorari, Justice Sanders examined the last seven initial applicants for admission to practice law in Washington. Justice Sanders noted that the Supreme Court of Washington had just admitted applicants who:

> 1. "sold seven ounces each of cocaine and heron (Bar Applicant No. 60);
>
> 2. conspired to import and distribute marijuana and transported $[illegible]0,000 to another country (Bar Applicant No. 59);
>
> 3. engaged in vehicle tampering and shoplifting (Bar Applicant No. 58);
>
> 4. sold over a pound of cocaine to undercover officers for $30,500 in addition to possessing over a half-a-pound of cocaine (Bar Applicant No. 57);
>
> 5. furnished alcohol to a minor, delivered a controlled substance to a minor, and committed third degree sodomy with a 14-year-old girl (Bar Applicant No. 56);
>
> 6. broke into a liquor store, burglarized home, stole payroll checks, and drove under the influence (Bar Applicant No. 55);

7. possessed marijuana and attempted to commit fraud (Bar Applicant No. 54).

Justice Sanders then challenged the majority as follows:

> "It is our charge to measure Mr. Garen's application by the standard we have applied to others. I would be most interested to hear any explanation from the majority as to how Mr. Garen has fallen below that standard we have set in prior proceedings enumerated above. *Cum tacent, clamant.*"

How did the majority respond to this challenge from the dissenting justices?

Did they publish a majority opinion explaining their rationale?

Did they publish a majority opinion citing as precedent another applicant who was evaluated in the same manner?

No! **What they did was to maintain a code of silence by refusing to even give these Justices permission to even publish their dissent!**

If this dissent does not in and of itself establish irrefutable and conclusive evidence of discrimination against Petitioner, it certainly does establish a prima facia case of discrimination. It certainly does provide a factual basis for this Court to grant Certiorari and force the Respondent *justify* their actions and keep them from hiding behind a conspiracy of silence!

III CONCLUSION

There is no question that your Petitioner was the victim of discrimination. The question is whether this Court is going to become a party to discrimination by condoning it!

There was a time when this Court condoned discrimination. There was a time when this Court permitted separate but equal schools with full knowledge that the minority schools were not equal at all! There was even a time when this Court condoned slavery. Most of us thought these times had vanished long ago.

The late Chief Justice Earl Warren recognized that this Court was the last place of refuge for the less fortunate, the people in society who suffer, and the disadvantaged!

The late Chief Justice Earl Warren recognized that this Court was charged by the Constitution make certain that the government was fair to its citizens!

When our founding fathers created our system of self-government and experimented, for the first time, with the power to govern coming from We, The People, they were concerned that democracy would vest the majority with the *power* to deny the rights of the minority. Our founding fathers sought to protect the minority from abuse by creating the Bill of Rights and establishing it as the basic and essential character of each and the every American. Our founding fathers hoped that we, as American citizens, would learn to give our Bill of Rights the same reverence we give to our God.

Our founding fathers entrusted ***you***, the Justices of the Supreme Court, to be the primary keepers of our Bill of Rights. ***You***, as the Justices of the Supreme Court, have primary responsibility to protect the minority from the majority. ***You***, as the Justices of the Supreme Court, have an obligation to maintain the sanctity of the Bill of Rights by forcing everyone to recognize and abide by it.

When you permit the states to violate the Bill of Rights, you plant the seeds of the destruction of our entire society. While denying admission to practice to one unimportant lawyer will certainly not destroy the county, you cannot do this without telling Americans that the Bill of Rights is not important anymore! You cannot do this without telling American that the Bill of Rights no longer protects the minorities from abuse of power by the majority! When you tell Americans that our Bill of Rights is not important and does not have to be followed anymore, you take away from us the one thing that identifies us as Americans. You take away from us the one thing that differentiates us from the other countries and civilizations in the world. You take away the one thing that protects the minority from abuse of power by the majority. You take away our Bill of Rights!

The Petition for Writ of Certiorari should be granted.

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